85-1727

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term 1976

John B. Nance, Ph. D., Petitioner

Oregon State System of Higher Education
and
Oregon College of Education, Respondents

***

On Appeal from the Court of Appeals of the State of Oregon (CA3637) Judgment entered February 26, 1976

A Petition for Certiorari

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i. The Court reverses a finding of fact of a jury by other than the common law: The court proceeding is an "action at law" depending upon the facts found by a jury of hearing officers empaneled by the state. The court substitutes its judgment for a jury finding on the basis of factual matters not in the stipulated record, provides an objection to a fact that was not objected to by the state, and ignores an important fact found by the jury. The Court violates due process and the common law of the seventh amendment by sustaining as a final order the opinion of the defendant President Rice. . . . 19

ii. The Court of Appeals is without authority to pass judgment upon the substantive issues of the case because it proceeds without a final order of the State Board of Higher Education. This is a violation of a constitutionally based immunity. Contested case procedures call for the court to consider temporary injunctions, or orders compelling an agency to take action without a final order, these are procedural questions. The Court can only consider the validity and substantive issues of a final order. There is no final order in this case because the board has taken no action. The state laws, the board rules, and petitioner's contract require the board to take action before termination. When the court sustains the decision of the defendant, they deprive the petitioner of . . . 26

the "equal protection of the law".

iii. The Court of Appeals is without authority to pass judgment upon the collective bargaining and labor dispute aspects of the case because they proceed without a final order of PERB. The petitioner and the OCE faculty are entitled to the PERB decision as part of the due process and equal protection of the law. In affirming his own contested case, the president declared that the Faculty Senate and the Hearing Officers were advisory to him and that the jurors had exceeded their authority in finding him in violation of the applicable laws. He introduced evidence from outside of the record to support his contentions. The petitioner objected to the president's authority, but countered the contentions with citations that the Senate was recognized by the Board as a collective bargaining agent, and that the case involved a labor dispute. The Court made erroneous rulings on eliminating the petitioner's evidence as outside of the record, but excepted the president's excursions from the record. The court was obliged to refer the case to a master when these "irregularities" appeared. PERB is the proper master to examine contentions in issues of labor disputes, and the court cannot proceed without a final order of PERB. ... 35

iv. The Court of Appeals enforces a law abridging a privilege and immunity of a citizen by impairing an obligation of contract. The Court appears to be holding that a contractual benefit is not a property interest protectable by the due process clause of the 14th Amendment. In this manner, the board may pass a law in October of 1973 that unilaterally ends the obligations of the contract they awarded the petitioner in July of 1970, by allowing the president to make a decision in March of 1975 that an award of tenure, granted by the board in November of 1973 is void, and a warning he issued in June of 1973 was in fact a proper final notice of termination. The president may ..51

take this action because the chancellor, in May of 1975 can retroactively declare that the grant of authority by the board to the hearing officers to make the initial state decision in December of 1974 is void, and that the president had that authority.

The Court condones this series of post hoc impairments of obligations of contract by the interpretation of ORS 351.070 which gives the board authority to proscribe the tenure of faculty and to enact rules and by laws for faculty government. The Court's interpretation is that this statute prevents the board from delegating authority to faculty, but not to administrators. The Court's premise is fallacious.

v. The decision of Chief Judge Schwab denies an interest in liberty and freedom in a manner that is inequitable because it is not in the best interest of the state. The question of liberty is still an issue because Chairman Duncan continues to make official disparaging comments about Dr. Nance's ability as a psychologist. Even though due process of law has found him in error, the Court's blanket condoning of administrative authority allows Chairman Duncan to exercise his discretion in an arbitrary and capricious manner. This is not in the best interest of the state because it threatens the principles of academic freedom. The court belittles the board rules protecting academic freedom because they are not "negotiated agreements". But these rules are the product of a national tradition, well supported by common law. The Court's condoning of Chairman Duncan's continued violation of these laws is neither just, equitable, nor in the best interest of the state. ..58

i. CONCLUSION 77

(Attachments)

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1) The Statutes cited are set out in full in the accompanying pamphlet of law.

iv. Code to Abbreviations

Adm. Code - The Administrative Code of the Oregon State Board of Higher Education (The Rules attached to Dr. Nance's 7-1970 contract)

Ap Br - The brief of the petitioner.

board - Oregon State Board of Higher Education

court - The Oregon State Court of Appeals

OAR - Oregon Administrative Rules of the Board of Higher Education, Revised 10-73

OCE - Oregon College of Education

ORS - Oregon Revised Statutes

PERB - Public Employees Relation Board

R Br - the brief of the respondents.

SOC - Southern Oregon College

PETITION FOR CERTIORARI

a. OPINIONS BELOW

This appeal is taken from the judicial review of the Honorable Herbert M. Schwab, Chief Judge, Court of Appeals of the State of Oregon, filed December 15, 1975 and reported at 75 Adv. Sh. 477, ___ Or. App. ___, ___ P2d. (Attachment C) Chief Judge Schwab affirms the final decision of a contested case hearing held by the Oregon State System of Higher Education. The relevant opinions are the Findings and Recommendations of the January 1975 Hearing Committee (Attachment B), and the Findings, Recommendations and Actions of the Faculty Investigation and Hearing Committees and Faculty Senate, April-July, 1974 (Attachment A)

b. GROUNDS FOR INVOKING U. S. SUPREME COURT JURISDICTION

i. Date of Judgment

The adjudgment and order affirming the decision was entered on February 26, 1976.

ii. Order Respecting a Rehearing

The Supreme Court of the State of Oregon entered an order denying a review of the decision on February 24, 1976.

iii. Statutory Provision conferring jurisdiction to review the above judgment.

This petition is predicated upon the following statutes:

1. United States Constitution

A) Amendment 1: Protection from the abridgment of the freedom of speech, and the right to petition the government for a redress of grievances.

B) Amendment 5: Protection from the deprivation of liberty and property without due process of law.

C) Amendment 7: " . . . no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

D) Amendment 14: Protection from the abridgment of privileges and immunities, from deprivation of liberty and property without due process of law, and from denial of the equal protection of the law, by the enforcement of a law by a state.

2. 42 USC 1983: The right to fix liability on a named person for deprivation of the rights, privileges and immunities secured above; and to hold this person liable for the injury in an action at law, suit in equity, or other proceeding for redress.

C. QUESTIONS ON REVIEW

Basis of Appeal

This case involves a basic constitutional challenge on a question which is in the public domain.

1. Public Question : The public question concerns the evolvement of academic freedom through the challenges of declining college enrollments. Shrinking enrollments cause a reduction of the entry of probationary faculty and a tendency for the faculties to become over weighted with tenured members. Without the constant inflow of fresh ideas and approaches, the faculties loose their flexibility to be as responsive to changing social conditions.

In response, the Boards of Higher Education have raised the tenuring standards and extended the probationary periods. They have also removed positions from the tenured track and filled vacancies with term appointments. The faculties have accepted the first approach, but they have resisted the second. A term appointed faculty is dependent on administrative caprice, hampering his academic freedom. A non-probationary, term-appointed teacher cannot extend the degree of loyalty or commitment to a faculty because he must be prepared to move on at the completion of the term.

Faculties have responded to the term approach tactics of the Boards by accelerating the movement toward collevtive bargaining. This case will demonstrate that collective bargaining pressures can end the tenure system by creating contracts that extend the same rights to all members of a unit. A faculty member on a term appointment has the same protection of grievance procedures as a tenured professor under the collective bargaining agreement at issue in this case. This overly rapid transition in form of

faculty governance imposes severe threats to the processes for assuring faculty excellence and for protecting academic freedom.

This case will provide the Supreme Court with an instance in which a tenured faculty member was suspended from his post for the cause of enrollment decline and then replaced with several term appointments. The faculty using their traditional form of governance, a faculty senate, challenged the president's decision. The board and the state have responded in an inconsistent and contradictory manner to this challenge. Both the state and the profession will benefit from the guidance of the Supreme Court. This is a federal question of substance not heretofore determined by the Supreme Court.

2. Basic Constitutional Challenge

Following an academic due process hearing sustaining the faculties challenge, the state provided a full scale civil proceeding before a jury. The jury's findings were that the president's decision was not made in good faith, that there was no proper notice of termination or suspension, that there was invasion of liberty interests and that a property interest exists in continued employment.

The State of Oregon then denied a U.S. citizen his right to the equal protection of due process of law by reversing a finding of fact of a jury by other than the common law. (Amendment 7) The reversal of the jury's verdict is prejudicial to the citizens' privilege and right to liberty and property. The verdict of the jury established an immunity which the state abridges through a fallacious interpretation of the controlling law. The Oregon court's inter-

pretation is fallacious because it assumes that the nature of the 14th Amendment is exclusive. Their interpretation is that they cannot terminate an employee because of racial reasons, but if the citizen is not excluded because of race, a constitutional challenge cannot exist. The controlling decisions of the Supreme Court indicate the 14th Amendment is inclusive in nature. It seeks to guarantee those rights of citizenship to all people no matter what their racial origins. A black man is entitled to as much opportunity as a white man to defend his life, liberty, freedom or property interest. This equality is based upon both Constitutional Due Process and the common law. The court below has decided this question in a way which is not in accord with applicable decisions of the United States Supreme Court.

ii. Reversal of fact found by a jury in a proceeding at common law.

a. Where a court of law receives findings of fact from a panel of hearing officers acting as jurors, does this invoke the protection of the Seventh and Fourteenth Amendments?

b. Where a court of law relies on evidence not in the record stipulated by both parties, is this a violation of the common law and due process?

c. Where a court of law objects to a fact not objected to by either party, is this a violation of the common law and due process?

d. Where a court of law does not consider a critical fact in overturning the jury's findings, is this a violation of the common law and due process?

e. Where the proceedings provide that the burden of proof is upon the president to establish the good faith of his action, and the findings of the jurors are contrary, is allowing the president to issue his own findings from off the record and use these facts to derive a conclusion sustaining his own contested decision a violation of the common law and due process?

f. Where a court of law accepts as fact the contentions of the defendant, and affirms his objections as being a final state order is this a violation of the common law and due process?

g. Where a defendant bears liability for injury to rights, privileges, and immunities, by 42USC1983, may this defendant enter the final state order on his own contested decision?

iii. Decision on substantive issues without a final order of a state agency.

a. Where state law requires the referral of contested cases to the Court of Appeals, for either temporary injunctions or decisions on the validity of the orders, does this create

reasonable expectations of due process?

b. Where the state law establishes that a determination of validity may be made only after a final order of the agency, but that procedural questions may be referred at any point in the contest, does this create a reasonable expectation of due process?

c. Where a "notice of hearing", the state laws, the board rules and the contractual provisions establish expectation of a final decision by the Oregon State Board of Higher Education, is this a valid requirement of due process?

d. Where a petitioner refers a procedural question to the Court of Appeals, and the Court does not rule on the procedural question, but rather finds a final order issued by the defendant and judges the substantive issues accordingly, does this create a violation of the equal protection of the due process of the law?

e. Where a Court of Appeals acts as a court of last resort, and by its decision blocks access to lower courts, who could have heard the substantive issues, does this create a violation of the equal protection and due process of law?

iv. Decision on collective bargaining and labor dispute issues without a final ruling of PERB - rulings on evidence submitted by both parties pertaining to these points.

c. Where PERB recognizes the OCE Faculty Senate as a labor organization pursuant to the claims of the faculty and stipulations of the board, does the action of the Faculty Senate in relation to employment rights and labor disputes enter into the jurisdiction of PERB?

d. Where the Faculty Senate passes regulations on employment rights, pursuant to their charter, and the charter of the board, and where the board approves these regulations pursuant to their Administrative Rules, is there a possibility that these

regulations constitute negotiated agreements under the jurisdiction of PERB?

e. Where the president declares that the OCE Faculty Senate is merely advisory to him, and that the Board's delegation of authority to the faculty to hold a contested case proceeding on the president's disputed order is not binding upon him, is there a possibility that this creates a labor dispute under the jurisdiction of PERB?

f. Where the Court of Appeals accepts the evidence from outside of the record, evoked by the president to support the above claim as not an error that is prejudicial to the substantial rights of the petitioner, is this a violation of the equal protection of the due process of the law?

g. Where the Court erroneously excludes evidence properly founded in the record to make a ruling that there is no evidence that the Faculty Senate is a collective bargaining agent, is this a violation of the equal protection of the due process of law?

h. Where the court passes judgment on these rights pertaining to employment, contract, collective bargaining, and labor disputes, without a final order of PERB, is this a violation of the equal protection of the due process of law?

V. Abridgment of privileges and immunities obligated by contract.

a. Where the board and petitioner entered into a contract in July of 1970 that described the sole power of the board to make tenure and dismissal decisions, that described the annual notice of appointment as the budgetary instrument of the board, and wherein the board promised that they would communicate any changes in their original commitment in this annual notice, does this constitute a property interest by fifth and fourteenth amendments?

b. Where this original contract of the board provided that Dr. Nance would be consid-

ered for advancement to tenure after three years, assuming a favorable tenure evaluation, by the criteria and agents named in the contract; and where the contract provides that if termination notice from the board is not received after six years of service, tenure is automatically granted; and where the board never altered this original commitment in their annual notices, does this constitute a property interest by the fifth and fourteenth amendments?

c. Where the provisions of the state laws require the review of all ordinances in effect on October 5, 1973 by PERB, to determine if conflict exists with the public employees collective bargaining law and requires that these statutes may remain in effect only if they are not in conflict; (ORS 243.772) where PERB reviewed the above ordinances and concluded that the board uses the budgetary process and annual notice to modify or reject chancellor and presidential action (in Dec. 1974), does this constitute a property interest by the fifth and fourteenth amendments?

d. Where following three years of service, Dr. Nance received a favorable tenure evaluation by the criteria, and from the agents named in his contract, and where the board issued a clear and unencumbered tenured contract effective with his fourth year of service, and where the board has not communicated any changes in their expectations since then, does this constitute a property interest in terms of the fifth and fourteenth amendments?

e. Where the terms of the original contract guaranteed that the board would hear any grievances arising out of their contractual obligations, following academic due process, before they made final a termination, and where this guarantee was never altered, does this consti-

tute a property interest by the fifth and fourteenth amendments?

f. Where, after challenge to the tenured contract by the chairman and president on grounds of enrollment decline, the board authorized the faculty to hold a due process hearing in which the burden of proof was upon the president, and where the findings and proposed order was against him, does this constitute a property interest by the fifth and fourteenth amendments?

g. Where following the illegal suspension of the petitioner in July of 1974, the court ordered a due process hearing, and the board delegated their discretion to faculty officers, and provided the services of their counsed, the Assistant Attorney General, pursuant to ORS 342.905(2), to perform the tasks requiring legal training and advise the hearing officers, and where the findings supported the order to reinstate with back pay, does this constitute a property interest by meaning of the fifth and fourteenth amendments?

h. Can the board make a decision in October, 1975, that they authorized the chancellor to make a final decision in May of 1975, that he could authorize the president in March of 1975 to make a proposed final decision that he had properly cancelled the board's tenure contract of November of 1973 on the basis of a warning he had sent in June of 1973? Can these retroactive breaches to the original contract of July, 1970 be sustained on the basis of rules passed in October, 1973, when the tenure contract of November, 1973 does not indicate any changes in expectation and does not contain any encumbrances? Are these actions a violation of the property interests sustained by the fifth and fourteenth amendments?

i. Where the board requires evaluation of a faculty member's research, scholarly, creative, and artistic achievements, as a condition of advancement to tenure and promotion; and where the board provides laboratories, studios, and equipment, budget and contractual services to sustain faculty in their scholarly achievements pursuant to OAR 41.160 (2b), is this a property interest of the fifth and fourteenth amendments?

j. Where the board proposed to evaluate Dr. Nance's research into the dream state, and his artistic ability in media expression as a condition of his employment, and to that end provided space, equipment, contractual support and a budget to produce an educational film reporting on his dream research, does that provide a property interest by the fifth and fourteenth amendments?

k. Where the board has promised a faculty member that during a due process hearing, he will not loose his academic freedom, not be suspended except on proof of clear and present public danger, and that even if suspended he will receive his salary and other rights; and where the board allows the faculty member to be suspended without pay and without cause, and further demands that he relinquish his space, equipment and repay the board $7,000 to $9,000. on the above mentioned film, and they further cancelled their contract with the film company contracted to distribute the film; is this a violation of a property interest protected by the fifth and fourteenth amendments?

vi. <u>Denial of Liberty and Freedom in an unequitable manner</u>.

a. Where state laws notify a faculty member of his opportunity to establish eligibility for professional employment, by success-

fully completing an internship, by evaluation according to a fixed criteria, by named state officers, examining material placed in a statutorily controlled file, is this a property interest by the fifth and fourteenth amendments?

b. At the end of that internship period when one state officer received a favorable recommendation from the officers designated to conduct the evaluation and contrary to law, destroys the material assembled in the file for higher review, and where the higher reviewing officer concludes that "Dr. Nance is not first and foremost a psychologist prepared to teach a broad range of cources in that area," without referring to the evaluations below or the file, is this a denial of a liberty interest in reputation by the fifth and fourteenth amendments?

c. Where the state provides a due process hearing to examine these allegations, and it is determined that the above action was illegal, and the conclusion was erroneous, and that Dr. Nance is entitled to his interest in liberty as a psychologist and a teacher of psychology, is this a property interest by the fifth and fourteenth amendments?

d. Following this due process determination, that there is a property and liberty interest in a reputation as a psychologist, and eligibility for professional employment as a psychologist, when the same state officer who was found to have illegally destroyed the file and subverted the recommendations, uses his original determination to forstall the professional opportunities of the petitioner, is this a violation of freedom and liberty in terms of the first, fifth and fourteenth amendments?

e. Where the state has provided the opportunity to achieve eligibility and provided due process to determine if eligibility was unlawfully encumbered; is it a violation of liberty to deny licensing as a psychologist on the basis of a recommendation determined to be illegal?

f. Is it a denial of an interest in freedom, liberty, and property for the state to deny an equitable review of the above proceedings, without examining the laws upon which this interest is based?

g. Does the interest of the state and nation in the tradition of academic freedom, require that proper judicial procedure follow the above described violations of freedom, liberty and property?

h. When Dr. Nance in sworn testimony questions his basic constitutional rights, can the state presume to make a final order predicated upon the fact that " . . . there was no confusion in Mr. Nance's mind about whether or not he had been given notice." (see page 25 this paper), without examining the issues of equity involved in their presumption about the contents of Dr. Nance's mind?

i When the state agency syas that judicial review should be based on the chancellor's May, 1975 order, and instead, the Court bases its review on the president's March, 1975 proposed order, is this a violation of due process?

e. STATEMENT OF THE CASE

A tenured faculty member was suspended from his post by a state college president for the stated reason of enrollment declines in July of 1974. The president replaced the tenured faculty member with several people on term appointments. The faculty protested this action in a series of formal votes. Prior to the July 1974 suspension the State Board of Higher Education, acting through their chief administrative officer, the Chancellor granted the Faculty Senate permission to hold an academic due process hearing to examine the cause and sufficiency of enrollment declines as a proposed reason for terminating the tenured faculty member. The department chairman and president failed to answer their subpoena's to the hearing. They caused the tenured faculty member to be suspended while the hearing was in session. The hearing officers found reason to question the good faith of enrollment declines as a sufficient cause and ordered reinstatement. The president failed to comply, an appeal was carried to the State Court of Appeals (court). The court ordered the Board of Higher Education (board) to hold a hearing on the grounds that the president's action was not a final order of the state agency, that there had been errors in procedure and that the substantial interests of the faculty had been damaged.

The board empaneled a jury of academic officers to arbitrate the dispute between faculty and president. The board properly served notice on the tenured faculty member that the hearing officers would make the initial decision of the agency, subject to a full board review. The board appointed their counsel, the Assistant Attorney General to act as legal advisor and to represent the board's

interest.

Following a full scale due process hearing the officers found that the reason of enrollment decline was insufficient, and not used in good faith; that the tenured faculty member was suspended without proper notice and that a property interest exists in continued employment. They ordered him reinstated with back pay, March, 1975.

On March 28, 1975 the president filed a rebuttal with the board declaring that the faculty senate, faculty division, and hearing officers were advisory to him and he was not bound by their findings or decision. He claimed that the arbitration panel had exceeded their authority by finding that he had violated the applicable rules. He proposed his own set of findings of fact, conclusions of law and decision, upholding his earlier action. The Chancellor stated his opinion that the decision of the president is the final order of the state agency on May 1, 1975. In October of 1975 the Board of Higher Education responded through their counsel, the State Solicitor General that the arbitration panel was authorized to enter the initial state decision (p. 12 R.Br.). The purpose of the hearing had been to determine if the cause of declining and shifting enrollment as stated in the President's letter was sufficient and if his decision had been made in good faith (p. 17, R. Br.) or if there had been reasons bearing on the faculty member's first amendment rights. (p. 18, R. Br. The board recognized that questions of personal conflicts had been present in the deliberations (p. 3, R. Br.) The board further stipulated that there had been no final order in the case prior to the Court's November, 1974 remand order that the July 1974 letter suspending the faculty member had not been a final order and that the president's proposed decision of

March, 1975 was not a final order (p. 12, R. Br. The final order was the Chancellor's May, 1975 opinion. The board admitted that there was no indication that the chancellor had reviewed the record prior to making the final order, (p. 23, R. Br.) but his order was based upon the conclusion that the petitioner was not being terminated for cause. (p. 5, R. Br.)

The board defended the chancellor by stating he had authority to delegate administrative power to make personnel decisions to the president. He was also authorized to permit the president to exclude findings of the arbitration panel and to draw findings from evidence outside of the record. (p. 18, 22, R. Br.) The board stated that they were excluded from having to review the chancellor's decision because no question of either a breach of contract or a labor dispute had been involved. (p. 9, R. Br.) The petitioning faculty member was from a college which had been prevented from certifying a collective bargaining unit by board action. The board recognized that they provided better grievance procedures for the colleges which had certified collective bargaining agents. But this disparate action was justified because the option to be represented by a collective bargaining agent served a valid state interest. (p. 7, R. Br.)

In December, 1975 the Court of Appeals affirmed the decision of the president as being the final order of the state agency. The court sustained the finding of the arbitration panel that the stated cause of enrollment decline was insufficient. The court sustained the panel's finding that there may have been unjustified violations of liberty in the proceeding. The court recognized that the president's determination was based upon evidence outside of the record. (Footnote 4)

The court reversed the finding of the panel of jurors that there had been improper

notification (p. 10). Since the court found that proper notice had been given, and since the court declared that this was not an equitable proceeding (footnote 1) then the president can choose not to renew the faculty member's employment for any reason or no reason, and no constitutional challenge will exist. (p. 12)

In February, 1976 the Supreme Court of Oregon declined to consider granting review, or to consider issuing a temporary injunction. The Court of Appeals returned the cause below for further proceedings pursuant to law and the opinion entered in December.

In May of 1976 the petitioner entered an appeal to the United States Supreme Court to examine the Constitutional Issues.

f. History of Federal Questions

1. February, 1974 Court of First Instance

A pleading to the OCE Faculty Senate for an investigation of an invasion of liberty and property interest by Chairman Duncan's action of naming the petitioner's tenured position to be vacated and replaced with term appointed instructors.

2. March, 1974

A pleading to the Oregon State Board of Higher Education for an academic due process hearing by AR 41.330 to 41.375 to determine Dr. Nance's statutory and constitutional rights before the removal of the privilege of tenure.

3. April, 1974

The Investifation Committee affirmed the existance of errors of procedure and probable existance of bad faith and proposed a due process hearing. The board ordered a due process hearing. The Faculty Senate authorized the Faculty Welfare Committee to proceed.

4. June - July, 1974

The Hearing Committee sustained the property interest and the existance of bad faith. They noted the chairman and president failed to answer their subpoenas.

The President unlawfully suspended the petitioner without establishing a clear and present public danger.

5. August, 1974 Court of Appeals

The petitioner appealed the President's

action on the basis of the violation of First, Fifth and Fourteenth Amendment Rights to the equal protection of due process of law to protect liberty, freedom and property.

6. October, 1974

The court ordered the case dismissed because the president's order was not a final order of a state agency.

7. November, 1974

The court reinstated the case and remanded it to the board on the grounds that there were procedural errors injurying the substantial interest of the petitioner in liberty, freedom and property.

8. December, 1974

The board ordered faculty officers to act as a jury of peers to hear the case and enter the initial decision of the state, subject to full board review; and so notified the petitioner.

9. January - March, 1975

A full due process hearing was held, in which the president was provided the opportunity to defend the good faith, and procedural propriety of his orders and actions. He failed to prevail on findings of fact and the jury's verdict was the petitioner shall be reinstated with back pay.

The defendent, President Rice, produced his own set of findings, concluding that Senate and Hearing Committees were merely advisory to him; that the jury had exceeded their authority in finding him in procedural violation, and therefore sustaining his proposed act of dismissal

as a final order. He did not examine the transcript or record, and based his findings on matters outside of the record.

10. May, 1975

The Chancellor stated his opinion that the President's order was final. He did not read the transcript nor review the record.

11. May - July, 1975

Petitioner re-entered Court of Appeals requesting a temporary injunction to retain his teaching position, pending the final order of the board. He based the appeal on his property interest in his tenured position and the procedural violations which were being used to deny him the interest.

The respondents did not protest the request for temporary injunction. The court denied the injunction without explanation.

The petitioner entered a request for review with the Oregon State Supreme Court, to which they have not yet replied.

12. September, 1975

The board responded through their counsel, the Solicitor General, that the Chancellor's opinion was the final state order.

13. December, 1975

The court entered the decision attached as C.

14. January - May, 1976

The petitioner appealed for a review of the Supreme Court of Oregon and was denied.

i. The court reverses a finding of fact of a jury by other than the common law.

1. STATUTES

A. United States Constitution: Amendment 7: "In suits at common law . . . no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

B. Oregon Constitution Art. VII, Section 3: "In Actions @ Law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

C. Oregon Constitution Art. 1, Section 10: Administration of Justice . . . "No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay; and every man shall have remedy by due course of law for injury done him in his person, property or reputation."

D. Oregon Constitution Art. 1, Section 17: Jury trial in Civil Cases. . ." In all civil cases the right of trial by jury shall remain inviolate."

E. ORS 11.010 . . ."there shall be but one form of action at law for the enforcement of private rights or the redress of private wrongs." 11.020 . . ."the enforcement or protection of a private right or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law, and may be obtained thereby in all cases where courts of equity have

been used to exercise concurrent jurisdiction with courts of law, unless otherwise specifically provided by statute."

F. ORS 662.130: Jury Trial "In all cases arising under (labor dispute statute) in which a person is charged with contempt in a court of this state, the accused shall enjoy the right to a speedy and public trial by an impartial jury wherein the contempt has been committed; ***."

G. ORS 183.480 Judicial Review of Contested Cases: "Review of orders other than a contested case shall be conducted by the court without jury as a suit in equity. Review of a contested case shall be confined to the record, the court shall not substitute its judgment for that of the agency as to any issue of fact, ..."

H. ORS 183.480 4. . . " by stipulation of the parties to the review proceeding, the record may be shortened."

I. ORS.663.215 "No objection that has not been urged before the board shall be considered by the court unless the failure to object is excused because of extraordinary circumstances."

J. OAR 41.355 Conduct of Hearing "The administration shall have the burden of proving its formal charges against the academic staff member and the committee findings shall be according to the preponderance of the evidence."

K. Adm. Code FF Termination of Employment 3f. Hearing committee. "The. . . faculty senate, or other proper elective faculty body shall appoint a panel of 12 faculty members; from this number, the same elective body will then name seven to serve as the hearing committee. . . the staff member is allowed one peremptory challenge. . ."(see also OAR 41.350)

2. JUDICIAL INTERPRETATIONS

A. Pennoyer v. Neff, 95US 714, 24 L Ed 565 (1878) Due process requires that there must be jurisdiction over both parties to a dispute.

B. Bonham's Case 8 co 114 a 118a (1610) "No man shall be judge of his own case."

C. Tomey v. Ohio, 273 US 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) Ward v. Village of Monroeville , 407 US 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972) Right to an impartial decisionmaker is required by due process. Those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.

D. Gibson v. Berryhill, 411 US 564, 93 S. Ct. 1689, 36 LEd. 2d 488 (1973) An impartial decision maker is essential in an administrative procedure. Disqualification because of interest extends with equal force to administrative adjudications.

E. In the case of John Perrin: ORS chapter 183, proceeding before the Oregon State Board of Higher Education, Jan. 22, 1973 Minutes: Conclusion of Laws 3. This conclusion examines the relation of the common law to a statement of reasons, to the hearing procedures and to the determination.

4. Statement of Facts

A. Fact 1, April, 1974 Investigation committee and June, 1974 Hearing Committee:

". . . Dr. Nance has proven competent in teaching psychology." June, 1974 Hearing Committee
Fact 2: the president and division chariman did not answer their subpoenas.

B. January, 1975 Hearing Committee
Fact 3: "There is generally a positive review and evaluation of Dr. Nance's work by his colleagues, the chairman, and students of OCE."
Fact 6: the president's June, 1973 letter is an "ambiguous" , "statement of uncertainty".
Fact 8: A clear, tenured contract was awarded by the board in November, 1973.
Conclusion 1: "Dr. Nance was not given a clear and unambiguous letter of termination."

C. The president's March, 1975 objection does not challenge any of the facts noted in 4A and B above.

D. The board's November, 1975 brief states: Fact 7: " . . . petitioner had received a favorable tenure evaluation in the spring of 1973." (p. 3 RBr.) The board does not object to any of the facts in A & B above on appeal.

E. August 16, 1974, Ex. 20 Deans file. The dean stipulates the following documents to the Assistant Attorney General and Board counsel as constituting record of notice.
4) "Letter from me to Dr. Rice dated May 23, 1973 recommending that Dr. Nance be given 12 month's notice."
5) "Letter from Dr. Rice dated June 7, 1973 notifying Dr. Nance that we could not assure him of employment beyond the 1973-74 year."

The dean's stipulation deliberately excludes a May 22nd notice from Chairman Duncan. Dr. Nance did not object to these stipulations.

F. June 11, 1975 pp. 93-95 JRR

Certificate of Record from D. R. Larson, Secretary, Oregon State Board of Higher Education, to the Court of Appeals. The board secretary stipulates only the Rice letter above as constituting record of notice. He excludes the chairman and dean's letter. Dr. Nance did not object to these stipulations.

G. December, 1975: Opinion of Chief Judge Schwab. Reexamines Fact 1 (4A above), Fact 3, Fact 6 and conclusion 1 (4B above) & Fact 7 (4D above) disputes Facts 1, 3, and 7 and reverses Fact 6 and conclusion 1. The court ignores Fact 2 and Fact 8 in 4 A & B above.

5 . ARGUMENT

Dr. Nance's right to trial by jury is established by Amendment 7 (1A above), Oregon Constitution , Art. VII, Sect. 3, Art. 1, Sec. 17 and Sec. 10 above. It is clear from Chief Judge Schwab's statement at footnote 1, that this is a proceeding at law. The president and Chairman Duncan had the burden of proving they were using the cause of enrollment decline in good faith by OAR 41.355 above. When they failed to answer their subpoenas they were in contempt and had a right to a jury trial by ORS 662.130 above. The Hearing Committee defined in Adm. Code FF 3F above is a jury system.

Chief Judge Schwab is bound by the jury findings by ORS 183.480 (6) above. The court is further bound by the stipulation of the parties (ORS 183.480 (4) above) and by the body of objections raised in the lower court (ORS 663. 215 above). The court's duty is to interpret the law on the basis of the facts determined by the jury and the instructions of the court to the jury.

At page 9, Chief Judge Schwab examines 2 facts litigated before the hearing committee.

He concurs with the fact that the reasons behind the administrative decision were not adequate. He re-examines and over-rules the fact that "Dr. Nance was not given a clear and unambiguous letter of termination.

In overturning the jury's finding Chief Judge Schwab agrees with defendant Rice's finding that there is no ambiguity in his notice. Neither Rice nor Schwab contend that the notice is clear on the surface. They contend the vagueness is excused because earlier conversations would make the intent of the notice clear to a reasonable person. At this point Chief Judge Schwab exhumes a long buried document Ex. 4, and offers it in evidence that the president's letter was therefore ambiguous.

Apparantly Chief Judge Schwab is attempting to establish that the jury made its decision without hearing enough proof of the facts and this establishes a common law basis for reversing their finding. This is not the case. The jury examined the meaning of the Duncan letter and meeting in great detail and concluded that the action was void on the basis of very severe procedural violations. (see pp. 14 Abstract Ap Br.)

The administration did not challenge the jury's conclusion on cross appeal, and in their stipulations to limit the record they deliberately left out documentation of the Duncan incident. Chief Judge Schwab goes beyond the stipulated record to retrieve this evidence, and thereby violates ORS 183.480 (6).

To support his contentions Chief Judge Schwab must also challenge another fact, that Dr. Nance received a favorable tenure evaluation and an unencumbered tenure contract. He deals with the latter fact by simply ignoring it. The former fact is re-examined in pp. 4-5. Apparantly he doesn't reverse the finding, but he does cast doubt upon it. Chief Judge Schwab

does not examine all the evidence that led the board to conclude that there was a favorable tenure evaluation. He does not restrain his probe by the procedural check that no objection was raised to this finding. He does not explain the "extraordinary circumstances" that permit him to consider an objection which was never raised.

Chief Judge Schwab's opinion is not in accord with the common law because he affirms the decision of President Rice as being the final order of the state system. This violates a basic principle of the common law that no man may judge his own case, or alternatively that both parties to a dispute must be within jurisdiction of the court.

After President Rice wrote the June, 1973 letter he bore liability by 42 USC 1983. After he failed to answer the subpoena he was in contempt in a labor dispute by ORS 662.130. He defended himself against these charges in the January, 1975 hearing.[1] He received unfavorable findings and conclusions. For the state to then retroactively provide Dr. Rice with authority to decide his own case is a prima facie violation to the constitutional privilege of due process and the equal protection of both statutory and common law.

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1. See TR 2, p. 41-42. Line 17, Dr. Rice: I don't know if I have a right to insert myself? Committee Chairman Evett: Yes, I think so. Dr. Rice: I would simply like to say that there was no confusion in Mr. Nance's mind about whether or not he had been given notice. My polite language did not leave him confused and as for my saying that anything was contingent upon some input from the psychology faculty or something like that, that I deny.

ii. The Court of Appeals is without authority to pass judgment upon the substantive issues of the case because they proceed without a final order of the State Board of Higher Education. This is a violation of a constitutionally based immunity.

1. Applicable Statutes

A. ORS 183.310 (4) DEFINITIONS: "Order" means any agency action expressed verbally or in writing directed to a named person . . . which grants, denies, modifies, suspends, or revokes any right or privilege of such person."

B. ORS 183.480 (1c) JUDICIAL REVIEW: "No action or suit shall be maintained as to the validity of any agency order except a final order . . . ."

C. ORS 183.470 ORDERS IN CONTESTED CASES: "A final order shall be accompanied by findings of fact and conclusions of law."

D. 183.415 NOTICE: (2) "The notice shall include (b) A statement of the authority and jurisdiction under which the hearing is to be held; (c) a reference to the particular sections of the statutes and rules involved."

E. OAR 41.370 DATE OF TERMINATION : "If the appointment of an academic staff member is to be terminated according to the procedure in AR 41.365, the appointment shall not be terminated sooner than one month . . . from the date of the written notice." (AR 41.365 describes the form of notice of decision by the administration during a due process hearing.)

F. OAR 41.375 REVIEW BY THE BOARD:

"*** The board shall make such determination of the case, pursuant to this code, as it deems just. If the board sustains the decision to impose a sanction . . . (it) shall be effective at the date originally named by the institutional executive or such later date as determined by the board."

G. OAR 41.475 (2) DECISION: "If a majority of the board officials have not heard the proceedings . . . each party . . . shall have fifteen days . . . to request an opportunity to present argument to the board. ... The board shall grant such opportunity for argument as soon as it can reasonaly be arranged. The board shall render its decision, accompanied by findings of fact and conclusions of law, within sixty days after the presentation of the argument." (This follows ORS 183. 470.)

H. OAR 41.335 INITIATION OF FORMAL PROCEEDINGS:" . . no institutional officer responsible for evaluating the charges shall participate in their preparation."

I. Adm. Code FF. TERMINATION OF EMPLOYMENT 3c INITIATION OF FORMAL PROCEEDINGS; "In any case in which charges are brought by the institutional executive, preliminary evaluation of the charges, determination to proceed to hearing and final review and action on the Hearing Committee's report will be by the Chancellor of the Oregon State System of Higher Education"

J. Adm. Code G-6 RELATIONS OF PRESIDENT'S, CHANCELLOR, BOARD AND STAFF: "The faculty . . . may have the right of appeal to the board from the president and the chancellor." (Board's Bylaw's ART. IV, Sec. 4)

Adm. Code G2 DEFINITION OF FUNCTIONS: "Disagreements between officers . . . are referred to the president but may be appealed to the chancellor. As a final resort disagreements may be appealed to the board, briefs and spokesman for each side of the question given due consideration.

2. JUDICIAL INTERPRETATIONS

A. Winter et al v. Grimes et al, 124 Or. 214, 216-217, 264 Pac 369 (1928)". . . One of the tests in determining whether a judgment or decree is final is: if no further action of the court is required to dispose of the cause it is final. Other tests are: is the order or decree one which determined the rights of the parties so that no further questions can arise before the court rendering it, . . . or is the judgment or decree one which concludes the parties as regards the subject matter in controversy in the tribunal pronouncing it?***."

B. Papadopolous v. Bd. of Higher Education 14 Or App 130 and No. 70049-Marion Co. Circuit Court. "Petitioner then initiated this judicial review proceeding in circuit court. The Board initially contended it was wholly exempt from the Administrative Procedures Act The circuit court ruled to the contrary-a ruling the Board's cross-appeal does not assign as error."

State Board Minutes #393-3 3-9-71, p. 145 ". . . the court's conclusion (is) that (petitioner) is entitled to a full Board hearing under the Oregon Administrative Procedures Act. The court ordered hearing would cause the Board to take evidence relating to the substantive issues in addition to the question of whether (petitioner) had received due process relating to non renewal."

3. OTHER AUTHORITIES

A. Academic Freedom and Tenure, 1940 Statement of Principles (4) "Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution.* * *"

B. Statement on Procedural Standards in Faculty Dismissal Proceedings, 1958.

"7. Consideration by Governing Body"
"The president should transmit to the governing body the full report of the hearing committee, stating its action. On the assumption that the governing board has accepted the principle of the faculty hearing committee, acceptance of the committee's decision would normally be expected. If the governing body chooses to review the case, its review should be based on the record of the previous hearing, accompanied by opportunity for argument, oral or written or both, by the principals at the hearing or their representatives. The decision of the hearing committee should either be sustained or the proceeding be returned to the committee with objections specified. In such a case the committee should reconsider taking account of the stated objections and receiving new evidence if necessary. It should frame its decision and communicate it in the same manner as before. Only after study of the committee's reconsideration should the governing body make a final decision overruling the committee."

C. 1968 Recommended Institutional Regulations on Academic Freedom and Tenure.

"(14) If the hearing committee con-

cludes that adequate cause for dismissal has not been established by the evidence in the record, it will so report to the President. If the President rejects the report, he will state his reasons for doing so, in writing, to the hearing committee and to the faculty member, and provide an opportunity for response before transmitting the case to the governing board.

The President will, on request of the faculty member, transmit to the governing board the record of the case. The governing board's review will be based on the record of the committee hearing, and it will provide opportunity for argument, oral or written or both, by the principals at the hearing or by their representatives. The decision of the hearing committee will either be sustained, or the proceeding returned to the committee with specific objections. The committee will then reconsider, taking into account the stated objections and receiving new evidence if necessary. The governing board will make a final decision only after study of the committee's reconsideration.

For both 3 a & b see Policy Documents and Reports of the American Association of University Professors, September, 1969, Washington, D. C.

4. STATEMENT OF FACTS

A. The Court of Appeals issued an order, affirming the board's motion that the Board of Higher Education had not reviewed this case pursuant to OAR 41.375, and therefore there was no final order pursuant to ORS 183.480 (1); the petitioner's plea for a temporary injunction was thereby dismissed.

B. In December, 1974 the board caused Dr. Nance to be served with a notice of hearing pursuant to ORS 183.415, the effect of which was to give him the expectation that the hearing would proceed by OAR 41.330-41.390, OAR 41.400-41.475, and ORS 183.415 to 183.470. This gave him a reasonable expectation that the board would hear the case prior to the issue of a final order, and that the hearing committee would make the initial decision of the state-agency, on the basis of whether Dr. Rice was using the stated cause of enrollment decline in good faith.

C. The March, 1975 opinion of defendent is "The termination of Dr. John B. Nance . . . effective June 15, 1974 is hereby affirmed and ratified." There was no June 15, 1974 termination as witnessed by fact A above. Dr. Rice was not authorized to issue the decision on his own contested case, as witnessed by B. above. If he were, the order would be unlawful by OAR 41.370 above.

D. The proposed final order of Chancellor Lieuallen of May 1, 1975 states, "I consider President Rice's decision to be the final order of the Department of Higher Education." This is insufficient as a final order because it contains no findings of fact or conclusions of law, and it is not based on a review of the evidence pursuant to ORS 183.470 above. Further, Dr. Lieuallen was not authorized to issue a final order by point B. above.

E. The board responded in October, 1975 that the Chancellor's opinion was to be considered the final order of the agency. (p. 23 R.Br.)

F. In December, 1975 the Court of Appeals predicated their review on the assumption that Dr. Rice's opinion is the final order of the state agency. (p. 3)

5. ARGUMENT

Dr. Nance's appeals to the Oregon Supreme Court and Court of Appelas have been for injunctive relief pursuant to ORS 183.490. The Agency may be compelled to act. "The court may, upon petition . . . compel an agency to act where it has unlawfully refused to act, or unreasonably delayed action."

He has not asked the courts to examine the validity of a final agency order pursuant to ORS 183.480 above.

These appeals have been predicated upon his constitutional privilege to enjoy the right to property during a due process proceeding. The board's rules provide that the faculty member is entitled to " . . . the same academic freedom as other members of the faculty" during the proceedings unless he is suspended. (OAR 41.355) To suspend a faculty member during the proceedings the president must find ". . . a clear and present danger that the . . . continued performance of his duties will be harmful to the institution . . . or to the public at large." But a suspension must be without financial penalty. (OAR 41.335) The president must defend the suspension and the burden of proof is upon him. (OAR 41.355)

The state abridges this privilege by unjustly delaying an equitable proceeding before the Oregon State Board of Higher Education. The board bears the liability because they are legally, professionally, and ethically required to hold a review of the substantive facts and due process procedures involved in this case before the tenured contract can be terminated.

The board is compelled to act professionally because the review of internal disagreements between faculty has been their historic role in

maintaining the tenure system. A conflict between a faculty and president is best mediated by the board because by this means they stay aware of the maladies of their own system. The board has adapted their due process hearing procedures after the national standards described in "other authorities" # A & B at the beginning of this section. (see p. 14-15 Ap. Br.) The national professional standards require a board review before the conclusion of academic due process. The profession clearly wishes to have its own internal processes of mediation exhausted before the court enters into the dispute. (p. 87-88 Ap. Br.) The board is an available step in the mediation, and a necessary step for due process of law.

The board has a legal responsibility to grant an equitable review on the matter because they entered into a binding agreement with a notice of appointment and notice of hearing. The agreement is bound by statutory provisions which provide a judicial remedy for a breach of contract. Their own rules, and the Administrative Procedures Act require the board to grant the review. When they deny that privilege they impose upon themselves a judicial test of the equity of their actions. Equity has to examine the fact that the board has granted review to all faculty members requesting it in the past.[1] They have a court order to grant an equitable proceeding in cases involving tenure rights. (see 2B above) They received an order implicating them in a OAR 41.375 review in this case. (4 A above)

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1. For instance both Pappadopoulos Cert. denied 417 US 919 (1974) and Perrin, cert. denied 417 US 950 (1974) against the Board of Higher Education were granted an equitable full board hearing before a final state order was issued.

The board has an ethical responsibility to grant an equitable review because they allow injury to be done to liberty and freedom by their silence. The state of Oregon now carries a case to the United States Supreme Court in which one state agent made a decision, defended his decision against a test of bad faith, declared himself to be above purview of the law, and receiving unfavorable findings and conclusion of law, decided that his original decision was valid.

Thus the original decision is the course of the body of the due process record, and the final decision by the same agent is also the final judicial determination, as it is confirmed by Chief Judge Schwab.

The courts'condoning of this arbitrary and capricious action by a state agent is a blow against academic freedom and the liberty interests of the petitioner.

The only question addressed to the court is whether or not the procedural requirements were satisfied. Beyond a statement on the procedural issues the court was without authority to pass judgment on the substantive issues. In this case the court didn't comment on the question asked, whether the board was required by law to hold a due process hearing on the matter.

iii. The Court of Appeals is without authority to pass judgment upon the Collective Bargaining and labor dispute aspects of this case. They proceed without a final order of the Public Employee's Relation Board (PERB). The petitioner and the OCE faculty are entitled to the PERB decision as part of the due process and equal protection of the law.

1. APPLICABLE STATUTES

ORS 662.100 Compliance with obligations involved in dispute and making reasonable effort to settle as prerequisites to injunctive relief. "No . . . injunctive relief shall be granted to any complaintant . . . who has failed to make every reasonable effort to settle such dispute . . . with the aid of any available governmental machinery of mediation . . . ."

ORS 662.415 State Conciliation Service established; purpose. "A State Conciliation Service is hereby established within the Public Employee Relations Board (PERB) with the primary responsibility for fostering collective bargaining. . . (1957)"

ORS 662.425 Mediation services (1) "When any party to a labor controversy notifies the State Conciliation Service that a labor controversy exists . . ., shall immediately set a time and place for a mediation conference."

ORS 240.086 Duties of PERB 2. "Review any personnel action that is alleged by an affected party, or an organization certified by the rules of the board as representing an affected party, to be arbitrary, or contrary to law or rule, or taken for political reason, and set aside such action if it finds these allegations to be correct."

ORS 240.560 "Appeal from suspension, reduction, . . . or dismissal; hearings; findings; reinstatement or modification of order of dismissal. (1) A regular employee who is reduced, dismissed, suspended or demoted shall have the right to appeal to the board (PERB) . . . (2) The hearing shall be conducted as provided for a contested case in ORS 183.310 to 183.500. (3) If the board finds that the action . . . was taken. . . for any political, religious or racial reasons, or was an unlawful employment practice . . . (4) . . . was not taken in good faith for cause, it shall order the immediate reinstatement and reemployment of the employee in his position without loss of pay. . .

The findings and order of the board shall be certified in writing to the appointing authority and shall be forwith put into effect by the appointing authority."

ORS 663.320 "Administrative procedures (labor relations): (2) Except as otherwise provided in (statutes cited) all hearings under ORS 663.005 to 663.325 shall be conducted in compliance with ORS Chapter 183."

ORS 342.915 "Hearing procedure. The following provision shall be applicable to any hearing conducted pursuant to ORS 342.905. (2) The hearing shall be conducted in accordance with rules and regulations adopted by the Fair Dismissal Appeals Board pursuant to ORS, chapter 183."

ORS 342.905 Appeal procedure. (8) An appeal from action of the Fair Dismissal Appeals Board shall be taken in the manner provided in ORS 183.480.

ORS 662.775 "Prevention of unfair labor or employment practice. " . . . any employee

organization qualified to apply for an election (statutes cited) may in its name or the name of its members, institute proceedings to restrain the commission of an unfair employment or labor practice."

ORS 663.125 "Employer unfair labor practices: No employer shall justify any discrimination against an employee for nonmembership in a labor organization if he has reasonable grounds for believing that membership was . . . not available to the employee on the same terms and conditions generally applicable to other members."

2. JUCICIAL INTERPRETATIONS

A. PERB: Southern Oregon College (SOC) Determination, No. C112, May 1973.

Findings of Fact "1. The Oregon State Department of Higher Education is the "public employer" as the same is defined by ORS 243.711 (5) ***"

Conclusion of law 1. . . . Both the employer and the labor organization have the right to designate their own representative. The issue of whether the designated representative has meaningful bargaining authority can be raised only in a charge of failure to bargain in good faith and not in a bargaining unit determination. Fry Roofing Co. v. NLRB 35 LRRM 2009, Billops Co., 67 LRRM 1323.

Order "1. The requested single campus unit is an appropriate unit."

B. PERB: Oregon College of Education (OCE) Determination et al No. C-277,319, 375, and 320 (merged) Dec. 1974

Findings of Fact 14. Mission, Structure, other working conditions at OCE. c. 1. Faculty Governance: The faculty governs itself and participated in institutional policy and practices by and through an elected Faculty Senate . . . All faculty employed at .50 FTE (or more) on a yearly or indefinite tenure are entitled to vote in senate elections."

Conclusions of Law 1. (The board and president are)"public employers within the meaning of ORS 243.650 (18) and ORS 243.682." 2. "Petitioners . . . are (a) labor organization within the meaning of PRS 243.650 (2), ORS 243.682 and ORS 243.686." 3. "All academic faculty employed at (OCE) are public employees within the meaning of ORS 243.650 (17).

Order 3. The Executive Secretary is directed to . . . expeditiously . . . complete the certification process thereof.

C. Boire V. Greyhoud Corp. 376 US 473, 55LRRM 2695, 2697 (1964) "This court held as long as American Federation of Labor v. Labor Brd., 308."

U.S. 401, 5 LRRM 670, that the 'final order(s)' made reviewable by S 10 (e) and (f) in the Courts of Appeals do not include Board decisions in certification proceedings. Such decisions, rather, are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committeed, as for example, where an employer refused to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit. In such a case, S 9 (d) of the Act makes full provision for judicial review of the underlying certification order by pro-

viding that 'such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed' in the Court of Appeals."

3. OTHER AUTHORITIES

A. House report (HR Rep No 972, 74th Cong, 1st Sess 5-6) at the time of the original passage of the National Labor Relations Act in 1935, where the congressional policy on judicial review was delineated: "When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review."

B. Senate Report No 573, 74th Cong, 1st session 14. "An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in

the manner provided in Section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board."

O. Respondent Employer's Memorandum of Law in OCE Determination et al Sept. 1974.

1. "Faculty Governance is already highly organized in the Oregon State System of Higher Education through the long established single institution local campus "Faculty Senates" and augmented by the "Inter-institutional faculty senate." The Faculty Senates have been and will continue to deal with those academic affairs classified as "voluntary" subjects of collective bargaining such as "***peer evaluation related to appointments, promotion, tenure and dismissal under uniform standards set as a result of systemwide negotiations."(p. 35)

"It is further the case that whole area of "criteria for promotion in rank and tenure" probably would fall in the area of voluntary subjects of collective bargaining and will be left within the jurisdiction of the Faculty Senates where such subjects now reside, regardless of whether single-institution or a statewide unit is found appropriate." (p. 48)

"(A faculty member is) an active and substantial participant in the process of management when it comes to governing the enterprise. He shares authority and responsibility with the administration and the governing board, and his participation is central, resting not upon the accomodation of contending political and economic influences, but upon the faculty's obligation as the institution's professional body to consider and recommend action in all matters directly related to the institutions professional work." (p. 36-37)

4. STATEMENT OF FACTS

A. In May of 1973 PERB determined that the single campuses of the state system were appropriate units for collective bargaining. (see 2A above)

B. In February 1974 the OCE faculty petitioned for certification and PERB scheduled a hearing for April 10, 1974.

C. In March, 1974 the board objected to the proposed OCE bargaining unit as not including all faculty members in the state system.

D. 1) In April 1974, Dr. Nance petitioned the board for a hearing on the basis of an unfair labor practice. ORS 243.672 (2d) The employer proposed to "violate the provisions of (a) written contract with respect to employment relations ***" by not involving the faculty in a program reduction determination pursuant to OAR 41.320. This is a labor dispute by the definition in ORS 662.010 (1), ORS 243.650 (11), 659.026, and 663.005 (5).

2) On April 4, 1974 PERB denied a request for a deferral of the hearing at OCE. On April 9, 1974 they ordered a merger of all hearings scheduled within the state system.

3) On April 19, 1974 the OCE faculty objected to the proposed merger as a delaying tactic.

E. On May 10, 1974 the OCE objections were denied and on May 22-29 the merged hearings were held.

F. In June 1974 the board conducted hearings through faculty officers on the Nance case and sustained his employment rights.

G. In July 1974 Dr. Nance was unlawfully suspended during the pendency of the above hearing.

H. In August 1974 Dr. Nance petitioned the Court of Appeals for reinstatement during the proceedings pursuant to OAR 41.355, 41.340 and 41.370; ORS 183.450(5), ORS 183.460, and ORS 183.470.

I. In September 1974 the board filed the memorandum of law described at 3C above.

J. See fact 4A Argument ii

K. In October 1974 Dr. Nance filed an appeal with the Supreme Court pursuant to ORS 662.120, for a review of the denial of the request for temporary injunction. He based his claim on the fact that the board was committing an unfair labor practice by restraining the employees of OCE in the exercise of rights guaranteed by ORS 243.662 (see ORS 243. 672 (1a)) Whereas the board already recognized the OCE Faculty Senate as a bargaining agent by 3c above, the board was preventing the faculty from gaining greater equality of bargaining power by delaying their certification. (see ORS 243. 656 (3)). The board was interfering with the administration of an employee organization (ORS 243.672 (1b)). The board was discriminating in terms of tenure, or terms and conditions of employment by offering better terms to SOC than to OCE (ORS 243.672 (1c)).

L. On November 26, 1974 PERB held a hearing on the proposed Findings, Conclusion and Order resulting from the hearing described in E. above.

M. 1. In December 1974 PERB issued the Findings, Conclusion & Order contained in 2b above and ordered a certification hearing for OCE on March 27, 1975.

2. In December the Supreme Court denied review of the appeal described in K. above.

3. See Fact 4B, Argument ii.

N. 1. January 1975 the board moved the Court of Appeals for a stay of order in M. 1. above.

2. The board conducted a second due process hearing by delegating their authority to a jury arbitrating between the president of OCE and the faculty senate in the Nance case.

O. In February, 1975 the OCE faculty entered objections to the board's proposed stay of order for certification, as a delty-ing tactic.

P. 1. March, 1975, PERB granted the board a stay on the certification hearing scheduled for OCE.

2. The Court of Appeals denied the board's requested stay of order.

3. The Nance hearing committee ordered Nance's reinstatement with back pay because the OCE president had exceeded his authority and did not make an enrollment decline decision in good faith.

4. President Rice found that the faculty is advisory to him, the Senate is advisory to him and the hearing officers had ex-

ceeded their authority by finding him in disobeyance of the controlling laws. He sustained his own order.

Q. 1. May, 1975 Chancellor Lieuallen considered President Rice's decision to be the final order in the Nance case.

2. Dr. Nance re-entered the court with a motion to order the board to review the case.

R. In October, 1975 the board responded to Dr. Nance's allegations that there is not a labor dispute involved in his case, and the collective bargaining statutes do not apply. They present detailed evidence on their contentions.

S. December, 1975: The Court of Appeals dismissed all of the evidence Dr. Nance proffered on the labor dispute and collective bargaining issues; admitted that Dr. Rice's facts are based upon evidence outside of the record; but accepted this evidence and the evidence proffered by the board. The court concludes on Dr. Nance's labor rights, without a final order of PERB.

5. ARGUMENT

A. Rulings on evidence

The facts above establish that the history of this case and the history of collective bargaining within the state system of higher education run an interactive course. President Rice brought this interaction to the forefront when he found that he was not bound by the faculty in the psychology division, by Faculty Senate, or by faculty acting as hearing officers (Finding 5 & 6), and that the

panel of jurors exceeded their authority in finding he had not followed proper procedure in suspending Dr. Nance.(Finding 8)

Dr. Rice made these determinations after the Hearing Report had been issued, and he based his findings on matters outside of the record. These findings were the basis of his conclusion and proposed order. Dr. Nance offered counter evidence. He had not introduced the evidence at the hearing because Dr. Rice had not made the contentions. The board carried this procedural error forward by introducing even more evidence bearing on the issue of how much Dr. Rice was bound by the collective actions of the faculty.

The court was faced with "allegations of irregularities in procedure & record." The court was prohibited from accepting this additional evidence by ORS 183.480 (6). ". . . no additional evidence shall be received. . ." but " . . . the Court of Appeals may refer the allegations to a master appointed by the court to take evidence and make findings of fact upon them." This master can be either the board or PERB, both of whom may hear appeals and conduct investigations by ORS, Chapter 183. (see ORS. 240.560 above)

The court's error is accepting Dr. Rice's excursion from the record (see footnote 4) while rejecting Dr. Nance's offered evidence. Dr. Nance was not obligated to prove that Dr. Rice's technical error was prejudicial; Chief Judge Schwab was obligated to dismiss any evidence that Dr. Rice offered outside of the original record. This dismissal is sufficient to undermine the factual basis of the conclusion and therefore the order.

Chief Judge Schwab was overzealous in eliminating Nance's evidence so that he could conclude; "The short answer is that petitioner's premises, quoted above, are based on factual matters that are not even remotely contained in the administrative record before us. There is not the slightest suggestion whether the board has not recognized the Faculty Senate as a collective bargaining agent." (p.6 Opn.)

Chief Judge Schwab made the following errors in his rulings on evidentiary matters. (see page 1).

1) The PPP report is as accepted by the Hearing officers as Exhibit 17 at Transcript 421. (see p. 43-44-53 Ap Br) The June 1970 report of the Personnel, Policies and Practices (PPP) Committee was approved as a campus ordinance on June 25, 1970 by the Senate. The ordinance reads in part:

"1) . . . faculty shall be involved in writing specific criteria for departments;

2) faculty be involved in evaluating colleagues and advising the chairmen on these matters;

3) that formal self-evaluation be broadened and used by colleagues and chairmen as bases for recommendations,

4) that student evaluation of faculty be considered in fashions formalized according to the needs of each department,

5) that the senate institute an all-college faculty committee to review recommendations for tenure, rank and salary."

The authority of the original investigation of April, 1974 stemmed from this ordinance and point 5 of the ordinance is what the January, 1975 Hearing Committee has reference to in finding that Dr. Rice had not followed proper campus ordinances in his original decision. The court is in error in his capricious

dismissal of the "PPP report, whatever that is." (p. 2)

2) Minutes of State Board meetings are legitimate sources of the rules of the board. Prior to the 1971 Administrative Procedures Act revision, the board enacted rules in their regular meetings and refered to the minutes of the meeting to cite the rules. The rules would later be codified and given a reference number in the Administrative code. Often the Campus Faculty handbook would continue to refer to the rule by citing the minutes rather than the reference numbers. As legitimate board rules, these minutes are within the acceptable purview of the court.

3) Proceedings at the University of Oregon and proceedings before the Public Employee Relations Board (PERB). The board is the court below, their decisions and findings are therefore a legitimate area for the Court of Appeals to review. Reports of hearing officers assigned by the board are actions of the board, as is the case in the University of Oregon proceeding. PERB is a court below, and their proceedings should be reviewed the same as a circuit court.

B. Evidence that the Faculty Senate is a labor organization and that the case involves a labor dispute.

Point 3C) above establishes that both PERB and the board recognize the Faculty Senate of OCE as a labor organization. This is a fact that PERB rules on in Finding of Fact 14 and Conclusion of law 2 in 2b) above. PERB concludes that the Faculty Senate is a labor organization entitled to certification.

Pursuant to ORS 240.086 above a review

of the case is within the duties of PERB. As the Collective Bargaining Statutes state, these rules apply before certification occurs; they can be activated by any labor organization, and they apply to any unfair labor practice. For instance at ORS 243.766, The board shall (PERB) . . .(3) conduct proceedings on complaints of unfair labor practices by employers, by employees and labor organizations and take such action with respect thereto as it deems necessary and proper. (4) Petition the appropriate circuit court for enforcement of any order issued by board pursuant to ORS 243.650 to 243.782.

This procedure is not tied specifically to collective bargaining agents. ORS 662.775 above reinforces this interpretation. A labor organization need only be qualified to apply for an election to institute proceedings to restrain an unfair labor practice. This is necessary to prevent an employer from blocking the certification process, as had been the situation here.

Since the board has been blocking the certification of the OCE Faculty Senate , then by ORS 663.125 above they are obligated to extend the same terms of employment to all of their employees within the same class. They cannot offer better terms to SOC because they obtained certification in June of 1973 without board opposition, and withhold terms from OCE because they applied 8 months later and the board decided to oppose certification.

For the board to argue that the awarding of better grievance procedures and better furlough arrangements at SOC is justified in order to maintain freedom to choose between collective bargaining and no collective bargaining, while denying OCE this choice is an arbitrary and capricious use of their discretion (see 5-9 R Br)

The ORS 662 Chapter on labor disputes is not tied to Collective Bargaining. Its passage in 1957 predates the issue of collective bargaining in public employment. By ORS 662.010 (1) "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating. . . maintaining, changing or seeking to arrange terms or conditions of employment."

This case clearly meets that criteria of a labor dispute, and the OCE Faculty Senate is clearly a representative labor organization.

C. Conclusion of the labor dispute issue.

The ORS Chapter 183 hearing provided to Dr. Nance is the same form of hearing provided in a labor dispute by ORS 663.320 above, in the challenge of a proposed dismissal of a public teacher who has been employed more than three years as in ORS 342.905, and as in an original hearing before PERB in ORS 240.560 (2) above. By ORS 240.086 PERB has legislative authority to review this case.

By ORS 662.100 the Court of Appeals is obligated to return the case to PERB before passing final judgment. The court is prohibited from passing prematurely on whether the Faculty Senate is a labor organization with meaningful bargaining authority, and whether the Senate agreement is a negotiated agreement, and whether their agreements on due process amount to binding arbitration procedures, by the common law cited in Fry Roofing and Boire v. Greyhound Corp. in 2A and C above.

The court recognized their limitation in their March, 1975 action of dismissing the

board's stay of order challenging the single campus unit determination. The court recognized that they could not judge as to the meaningful bargaining authority of a faculty representative organization until they had a final order.

There are grounds to suspect the motives of an employer who attempts to withhold the rights of collective bargaining from the 180 faculty members of OCE on the grounds that their Faculty Senate is not a labor organization, as in this case. While at the same time blocking certification on the grounds that they have recognized the OCE Faculty Senate as a collective bargaining agent since 1962, and therefore they wish to bargain with a statewide agent, to protect the integrity of the campus faculty senates.

For the court to dismiss all evidence relating to this dispute submitted by the petitioner, but to accept the defendents' claim that the Senate is merely advisory to him is neither just nor equitable. The court's jurisdiction is limited pending a final order from PERB on the labor relations aspects of the case.

iv. The Court of Appeals enforces a law abridging a privilege and immunity of a citizen by impairing an obligation of contract. (14th Amendment)

1. Applicable Statutes

A. 1. Oregon Constitution, Article 1, Section 21: "No ex-post facto law, or law impairing the obligation of contracts shall ever be passed," ***.

A. 2. ORS 29.020 4) "Property means a present or future legal or equitable, vested, or contingent interest in . . . general intangibles. . . contract rights. . . choices in action."

B. ORS 351.070 (1) (a) (1) "The State Board of Higher Education may for each institution under its control, (a) appoint and employ a president and the requisite number of professors, teachers and employers, and prescribe their compensation and tenure of office or employment (emphasis supplied)***. (2b) 2. Enact rules and by laws for the government thereof, including the faculty, teachers, students and employees therein."

C. ORS 351.060 It is the responsibility of the board to institute, maintain and participate in suits, actions and other judicial proceedings in the name of the State of Oregon *** for the purpose of carrying into effect any and all of the powers, duties and authority given to the State Board of Higher Education by this section ORS 351.070 and ORS 351.150.

D. Adm. Code L-3-A " . . . Appointments to positions in the academic classification in the salary budget are made by the board upon the recommendation of the department head, the dean, the executive head of the institution

and the chancellor."

E. Adm. Code F-2-A Sole power of decision rests with the board in the selection, appointment, promotion, salaries, transfers, suspensions and dismissals of all officers, members of the faculties, and other employees of the system and its component divisions. The chancellor shall have authority to make recommendations to the board.

F. Adm. Code G-1-B Sole power of election and confirmation of appointments rests with the board.

G. Adm. Code L-3-F and OCE Regulation 5-B 2 & 4 (1970-71 Staff Handbook) Full time members of the academic staff appointed with the rank of Assistant Professor or avove. . . ordinarily are considered for indefinite tenure effective with the courth year of service. . . Annual appointment for a seventh consecutive year shall normally include the granting of indefinite tenure unless the seventh annual notice of appointment specifically provides otherwise. . . The above policies will operate in all appointments unless in individual cases there is definite written understanding to the contrary, in which case the exception will be noted in the annual notice of appointment." (emph. supplied)

2. Judicial Interpretations

A. Papadopoulos v. Board of Higher Education. ibid. @ 705 ". . . employment contracts of public employees may create rights to continued employment over and above that provided by statute or regulation. But such an employment contract, standing alone, does not create the kind of interest that triggers the requirement of a due process hearing before the government

withdraws the benefits of the contract, ie. breaches it. In such a situation, the public employees' remedies are measured by the law of contracts, not by constitutional law.

B. PERB: OCE certification et al. no C277 12-74. Findings of Fact: 19. "The BHE (board) exercises its statutory powers over institutions in the DHE (Division of Higher Education) through its Administrative Rules, (and) the budget process. . ." "21. The BHE uses the budget process to accomplish the following: a) modify or reject chancellor and presidential actions on . . . terminations, tenure. . . other employment conditions. . . ."

C. Perrin v. University of Oregon board Conclusion of Law (in Jan. 22, 1973 Board minutes) #21(c) "His (the president's) act of denying promotion and tenure and his decision to terminate petitioner was ratified by the State Board of Higher Education in approving the budget of the University of Oregon which did not include provision for continued employment of petitioner." #7 "The petitioner has no contractual rights . . . implied, unilateral, or expressed, except as set forth in his notices of appointment and Administrative Rules" (emph. supplied.)

3. Other Authorities

A. Opinion of Attorney General: 7-1970: "Suggested Basic Subjects for form of Letter Offer of Academic Appointment.

6. Offer of appointment made subject to: (a) written acceptance by offeree. . . (b) approval of the Board. . .

7. . . .appointment. . . is provis-

ional until approved by the Board.

8. Send copy of Board Administrative Code with the statement that it includes the current rules of the Board governing his employment."

4. Statement of Facts

A. On July 1, 1970 the Oregon State Board of Higher Education entered into a binding contract with Dr. Nance. This formal process included attaching the Board's Administrative Code (3 A 8 above) to the offer. Dr. Nance announced his resignation from his tenured post as a community college psychology instructor on the basis of the offer. (Ex. 9, p. 5). The board stipulated that their contractual rights were set forth in the annual notice of appointment. (2C above). Any change in the original commitment would be expressed by the board in the notice of appointment. (1G above) Dr. Nance understood that sole power of decision as to tenure, promotion, or dismissal rests with the board and that the decisions would be expressed by the budgetary process reflected in the annual notice of appointment.

B. In November, 1973 the board fulfilled the terms of the original contract by granting Dr. Nance an unencumbered tenured appointment. This contract followed three annual appointments and an affirmative tenure evaluation. (1G above)

C. In March, 1975 board appointed hearing officers confirmed that the contract was a valid and binding document, and confirmed Dr. Nance's right to continued employment. (Nance Hearing Committee Finding 8 , Conclusion 1A)

D. In October, 1975, the board confirmed that the tenure evaluation was affirmative and that a valid contract existed. (p. 2-3 RBr)

E. In February, 1976 the court found that ORS 351.070 above, allowed the board to retroactively delegate their statutory power to the president, to retroactively alter binding contracts, and to make ultimate decisions, p. 5-6. The court found this statute prohibits the board from delegating discretion to the faculty to enter into tenure evaluation (p.4) and to receive a delegation of authority to act as hearing officers and make the initial agency decision pursuant to OAR 41.430. (p. 5) The court did not take cognizance of the unencumbered contract.

5. Argument

This dispute concerns the degree to which the board may delegate their discretionary power, and to whom it may be delegated. The facts upon which the dispute is based concern the nature of the contract and the relation between contractual and constitutional law. The court has previously found that the statutes cited in 1 B & C give the board authority as a public quasi-corporation, to enter into contracts binding upon the state, and to make rules which are state laws. The court has previously required the board to adjudicate contractual questions before court review pursuant to ORS 351.060 above. (Vandever v. State Board of Higher Education 80 OR Ap 50, 491 P2d 1198, (1971); West v. Bower ___ Or App ___, 502 P2d 270, (1972)

The court appears to be taking a different position in the Pappadopoulos quote at 2A above and in this case. Apparantly a con-

tractual right is no longer associated with a constitutional right. The court's opinion is in opposition to the fifth and fourteenth amendment concept of property, privilege and immunity. The Oregon Constitution, Article 1, Section 21 forbidding the passage of a law impairing an obligation of contract is in opposition to this view. ORS 29.020 above defines a contract right as a property.

Dr. Nance has stated the position that the tenured contract of the board establishes an immunity which cannot be abridged until the board hears the case. (see argument ii above) Since the board stipulated these conditions in the initial offer of contract and Dr. Nance accepted the board's offer in good faith, the board is prohibited from passing a subsequent rule that impairs their obligation.

In October, 1975 the board took the position that in October, 1973 they authorized OAR 11.110 which gave the chancellor power to delegate personnel decisions to the president. Therefore the May, 1974 opinion of the chancellor gave authority to the president to make an order in March, 1974 that affirmed and ratified the fact that he had given proper notice in June of 1973. (p. 11 RBr.) These ex-post-facto laws and decisions are therefore binding upon the July, 1970 Board Contract and the October, 1973 Award of Tenure, and the December, 1974 notification that the decision would be made by the hearing officers.

The state's position is that even though no one told Dr. Nance, you are going to be terminated, or you are terminated; they can tell him retroactively you were terminated and this does not raise a constitutional challenge. The court affirms and enforces this interpretation of the law by a catch-all interpretation

of ORS 351.070 (1a) above. By this interpretation the state can retroactively strip Dr. Nance of his tenure contract and his right to due process and thereby conclude that since there is no property interest involved, the state can act as arbitrarily and capriciously as they desire (p. 9 opinion). The state can also declare that the faculty officers have less power than any other person the board might choose as hearing officers by interpretation of ORS 351.070. above. (p. 5 opinion). There is no constitutional challenge in declaring that faculty are second class citizens when it comes to hearing matters of tenure rights and this does not create a labor dispute. (p. 9, RBr.) This interpretation is inconsistent with the court's previous interpretations of ORS 351.070.[1]

The state's position is based on a disregard for their own laws. The president cannot defend his June, 1973 warning on the basis of whatever delegation he received in October, 1973. His June, 1973 warning was cancelled by the November, 1973 clear contract from the board. Likewise the president cannot "ratify" a dismissal in July of 1974 on the basis of an order in March of 1975. Nor can the chancellor retroactively give the president permission to do so. Finally, a contract is a property right within constitutional purview and it cannot be breached by the state without due process.

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1. In Pappadopoulos op. cit. at 686-687 The Court cited ORS 351.070 (1a) to support the conclusion that the board could grant a denovo review on the substantive and procedural issues involved in an Administrative decision.

V. The decision of Chief Judge Schwab denies an interest in liberty and freedom in a manner that is inequitable because it is not in the best interest of the state.

1. Statutroy Provisions

A. United States Constitution: Amendment 1. "Congress shall make no laws. . . abridging the freedom of speech. . . and to petition the government for a redress of grievances."

B. Oregon Constitution, Article 1, Section 8. "No law shall be passed (or enforced) restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever."

C. OAR 42.010 Academic Freedom. "The teacher in the State System institution is entitled to freedom in the classroom in discussing his subject. . . As a matter of policy the Board does not attempt to control or sway the personal opinion of any person in the faculty . . . nor the public expression of that opinion."

D. Oregon Constitution, Article 1, Section 20. Equality of privileges and immunities of citizens. "No law shall be passed granting to any citizen or class of citizens privileges, or immunities which, upon the same terms, shall not equally belong to all citizens."

E. ORS 183.415 (8) ". . . on petition, a court having jurisdiction to review under ORS 183.480 may reduce or eliminate the charge upon finding that it is equitable to do so, or that matters of general interest would be determined by review of the order of the agency."

F. ORS 28.020 Declarations as to writings and laws. "Any person interested under a . . . written contract or other writing constituting a contract, or whose rights, status,

or other legal relations are affected by a constitution, statute. . . charter, ordinance, contract, . . . may have determined any question of construction or validity. . . and obtain a declaration of rights, status, or other legal relations thereunder."

G. ORS 183.410 Agency determination of applicability of rule or statute to petitioner: effect judicial review. "On petition of any interested person, any agency may in its discretion issue a delaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it."

H. ORS 183.400 Judicial determination of validity of rule. "The declaratory ruling may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court."

I. ORS 662.080 Hearing and findings of certain facts are prerequisites to injunction. (3) "That as to each item of relief granted greater injury will be inflicted upon complaintant by the denial of relief than will be inflicted upon defendants by the granting of relief."

J. ORS 243.656 "The Legislative Assembly finds and declares that . . . protection by law of the right of employees to organize and negotiate collectively safeguards . . . equality of bargaining power between public employers and public employees: . . . by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relations with pbulic employers."

K. ORS 662.020 Declaration of policy as to labor organizations. . . "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor and thereby to obtain acceptable terms and conditions of employment, wherefor . . . it is necessary that he have full freedom of association, self-organization and designation of representatives of his own choosing to negotiate the terms and conditions of his employment."

L. ORS 662.030 "Any Undertaking or promise in conflict with the public policy declared in ORS 662.020 is declared to be contrary to the public policy of Oregon and is not enfoceable in any court of this state and does not afford any basis for the granting of legal or equitable relief by any such court.

M. Preface to the board's amended Administrative Code adopted 12-1968 #370-48. "(It is the institution's obligation to) maintain an internal structure for governance that will give appropriate roles to students, faculty, and administration in the governance of the academic community. The aim should be to maintain a structure that will foster a sense of community within the institution rather than a spirit of separation among its elements. And since, in the lively atmosphere of the academic community, differences will arise, efforts should be made to establish an organized, systematic means for recognizing fundamental areas of conflict when they arise, and of dealing with them promptly in an educationally constructive fashion."

N. Statement by the Oregon State Board of Higher Education Relating to Faculty Conduct and Amendments to the Board's Administrative Code, October, 1970.

2. "As a member of a learned profrssion that depends upon freedom of opinion, freedom of inquiry, and freedom of expression for its health, vitality, and integrity, the faculty member has a special responsibility to support and defend these freedoms against incursions from within the academic community with the same vigor with which he defends them against outside incursions which would limit or abridge their free exercise."

Such defense requires continuing adherence to the high standards of scholarly commitment that have generally characterized our institutions, and a vigorous rejection of those attitudes which, though rarely encountered in state system institutions, have elsewhere jeopardized academic freedom and public confidence - such attitudes as: - - the attitude that 'academic freedom' means an absence of restraint and an absence of accountability to the institution and to society which has established and supports the institution."

2. Judicial Opinions

A. Keyishian v. Board of Regents, 385 U. S. 589, 603. "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the first amendment, which does not tolerate laws which cast a pall of orthodoxy over the classroom." (see also Sweezy v. New Hampshire 354 US 234)

B. Malinski v. New York 324 US 401, 414 (1945) "The history of American Freedom is in no small way the history of procedure." (Mr. Justice Frankfurter)

C. Joint Anti-fascist Refugee Committee

v. McGrath, 341 US @ 179, "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." (Mr. Justice Douglas)

D. Board of Regents v. Roth 408 US 564, Justice Marshall's dissenting opinion, quoting Professor Gellhorn: "In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safequards. I echo the late Justice Jackson in saying: 'Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is best assurance for Government itself against those blunders which leave lasting strains on a system of justice' - blunders which are likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal than one's own." 6J. Soc. Pub. Teachers of L. 70 (1961).

E. Mr. Justice Douglas in his dissenting opinion in the Roth case op. cit., quotes the Court of Appeals in the Sinderman case. 430 F 2d. 944-945. "School constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence, and school policy, which so frequently must be balanced in reaching a proper determination."

F. Schware v. Board of Bar Examiners 353 US 232 (1957) "The state cannot regulate the eligibility for professional employment in a manner that does not give proper emphasis to due process."

G. Rice v. Elmore 165 F2d 387, 92 L. Ed. 1151 68 SCt. 905; Burt v. New York 156 F2d 791 "The invasion of a state activity on a personal constitutional right which denies the equal protection of the laws is within the purview of a jurisdection in equity."

H. International News Service v. Associated Press 248 US 215, 63 LEd. 211, 39 S Ct. 68, 2 ALR 293. "Any civil right of a pecuniary nature is deemed to be a property right for equity purposes. The right to acquire property is held to be on parity with the right to preserve property."

I. American Association of University Professors, Bloomfield College Chapter et al. v. Bloomfield College et al., Docket No. C4241-72, Superior Court of New Jersey, Chancery Division, Essex County, June, 1974. If a proposed rule abrogates existing contract rights, such a rule cannot be promulgated, despite the board's general statutory powers. Thus, a tenure system cannot be abrogated unless a bonafide financial exigency is declared.

3. Statement of Facts

A. On May 22, 1976, Dr. Nance will have an oral examination from a subcommittee of the Psychologist Licensing Board to determine if he will be licensed to practice psychology within Oregon.

B. The oral examination occurs after the board certified Dr. Nance's internships in

Industrial, Educational and Clinical Psychology. The board received favorable recommendations from his supervisors in each internship. His internship experiences include; three years in the aerospace industries as a behavioral research scientist specializing in simulation based training systems; five years as a tenured junior college instructor in media and psychology; four years as an Assistant Professor of Ed. Psychology at Oregon College of Education; one year as an Associate Professor of Psychology at Linfield College and one year as Staff Psychologist at Oregon State Penitentiary. (OSP)

C. Dr. Nance's eligibility for licensing is also based on the board's accepting his schooling in Education and Psychology which includes, 151 semester units relating to the teaching of psychology and a dissertation based on original research in applying media to the teaching of psychology and a Doctors of Philosophy in Education specializing in media supplemented by psychology.

D. Dr. Nance successfully passed the objective eligibility exam for psychology licensing by scoring significantly higher than the national average.

E. On March 26, 1976 Department Chairman Duncan cast a shadow on the four years of internship at Oregon College of Education by declaring to John Cavender, School Supervisor at Oregon State Penitentiary that John Nance is **not** qualified to teach General Psychology. His primary area of preparation is media.

F. The above event occurred after Mr. Cavender invited Dr. Nance to teach a general psychology class for inmates in the Spring term, 1976. The prison runs a school which includes the first two years of college. The Psychology

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curriculum had previously been taught by Dr. David Brody, Professor at Oregon College of Education. On his retirement the courses were available. Dr. Nance had been leading therapy groups in the school with some success. From Mr. Cavender's perspective, Dr. Nance was well qualified to teach the accredited classes. Accordingly, he enrolled 40 students, ordered the texts and the films. Accreditation was assumed to be automatic, through the Division of Continuing Education, State Department of Higher Education.

G. Chairman Duncan blocked accreditation two days before the first day of class with the conversation described in E. above. Dr. Duncan indicated that there were a couple of people he could recommend to teach the course who were better prepared than Dr. Nance. Duncan remained adamant even when Mr. Cavender explained that the enrolled students were expecting to take the class from Dr. Nance. Mr. Cavender requested a written explanation and Dr. Duncan said he would have to talk to a couple of people. Neither the recommendation for alternatives nor the written explanation have arrived.

H. Following Dr. Duncan's original decision that Dr. Nance was not first and foremost a psychologist, in May of 1973, Oregon College of Education determined that 39½ additional faculty would have to be terminated because of enrollment declines. This represents about a quarter of the total faculty. (see Ex. II-3,18)

I. The method of selecting the faculty who would be terminated became a major labor dispute during the 1973-74 school year. In April of 1974 the Board of Higher Education received a petition with approximately one quarter of all students at Oregon College of Education

signing and providing social security numbers. The students were requesting a declaratory judgment from the board pursuant to ORS 183.410 and ORS 28.020 on the following rules; AR 41.320, AR 41.160, AR 41.015, AR 41.010 and AR 42.900. The students petitioned for involvement in the process of determination by having serious weight given to their faculty evaluations. They claimed an interest in the determination because the quality of their education was at stake. The students contended that Dr. Nance's case provided an example that the administrative Rules were not being followed. (Ex. 11, Sec. 3, p. 20-24)

J. On June 7, 1974 Chancelor Lieuallen responded to the concerned students, President Rice, and all board members, "It does not appear to me that your letter identifies any violations of the Board's Administrative Rules." The board never responded to the petition for a declaratory ruling. However, the enrollments leveled and the faculty members were not terminated. (Ex. 11 Sec. 3)

K. January, 1976, President Rice announced his resignation. Chancellor Lieuallen allowed the Oregon College of Education faculty to choose three of the twelve poistions on the presidential search committee. The students were allowed to choose one position. When the University of Oregon chose their president in 1970, the faculty chose five of the twelve positions. The OCE Faculty Senate protested this inequality to Chancellor Lieuallen, but no changes have been made. The OCE faculty have not been able to accredit themselves as a collective bargaining agent as of May, 1976. There is some indication that accreditation will now occur in October of 1976.

4. ARGUMENT

Oregon has provided Dr. Nance with a

series of investigations, hearings and court reviews that collectively satisfy the due process clause of the 14th amendment. The purpose of this process was to examine his interest in property and liberty. (p. 3 Opinion) Also at issue is whether the reasons behind his suspension had any bearing on Dr. Nance's first Amendment Rights. (p. 18, R Br)

The state concurs that the burden of proving the sufficiency of enrollment declines as a reason for termination is upon them. (p. 9, R Br: AR 41.355) They also concur that after suspending Dr. Nance without pay in July, 1974, that Pres. Rice had the burden of proving that allowing him to continue exercising his "academic freedom" represented a "clear and present danger" to the public at large. (AR 41.340 and 41.355 see p. 9, R Br) The court review does find that enrollment decline was insufficient as a cause (p. 8-9 Opinion) The court fails to find a "clear and present danger" that would warrant violation of Dr. Nance's liberty interests and academic freedom. (p. 9 Opinion)

Oregon deals with this problem by merely stating paradoxically that Dr. Nance did not prove any ulterior motives and therefore is not entitled to prevail. (p. 18, R Br) The court contends with the liberty issue by ignoring it. Though the issue is copiously briefed by both parties, and though the court has commented on liberty in every other case of a similar nature, in this opinion Chief Judge Schwab studiously avoids the topic.

Perhaps the court's reluctance to comment on liberty and academic freedom is caused by their attempt to avoid the issues of equity. In this particular case, the court felt they would best serve the state interest by avoiding the equity issues. (see ORS 183.415 (8) above)

Beyond asking whether a "reasonable person" would understand that the June, 1973 notice communicated that his employment would not be renewed, and beyond concurring in the president's observation that " . . . there was no confusion in Mr. Nance's mind about whether or not he had been given notice" (TR 2, p. 41, L. 23-25, p. 10 Opinion and beyond examining if the procedural issues were sufficient to prejudice the substantial rights (ORS 183.480 (7a), then "this is not an equitable proceeding." As the court notes in their fourth paragraph, they do not consider "the issues of academic freedom" and "the end of the tenure system" and the "balance of power" between administration and faculty to be generally justifiable.

The United States Supreme Court does not place these limitations upon themselves in the examination of liberty and freedom. In the Roth decision the Court indicates they will examine liberty on the basis of the action and the consequences of the action (33LEd2d@558-59) The court indicates they will examine liberty in relation to freedom as both a procedural and equitable issue (33LEd2d@558-59). An equitable review will examine the balance of the contending political and ideological forces in relation to the needs of the society to determine if authority is being used arbitrarily and capriciously to forstall liberty and freedom.

Chariman Duncan's March, 1976 action in 4A above provides a particularly clear challenge to a liberty interest. Dr. Duncan's action in declaring to Dr. Nance's present employer that he is not qualified nor prepared to teach General Psychology, imposes a stigma which demonstrably diminishes Dr. Nance's ability to advance in his present position and

to obtain state licensing as a psychologist. Duncan's comment is given as the reason for his denial of permission to allow Dr. Nance to teach General Psychology at the prison. For this incident to be a bonafide violation of Liberty, Chairman Duncan's statement that Dr. Nance is not qualified nor prepared to teach General Psychology must be untrue.

In exploring the truth of the assertion please examine the fact that the State of Oregon; Board of Higher Education through their agent, Chairman Duncan, has told the State of Oregon, Human Resources Department, Corrections Division, that they may not use their staff psychologist to teach inmates general psychology. The State of Oregon will allow Dr. Nance to analyze the personality dynamics and to make psychological evaluations of the inmates to determine the degree to which they are rehabilitated and likely to be a further menace to society; the State will allow Dr. Nance to provide therapy to these inmates and to proscribe treatment to further the rehabilitation process; ut Oregon will not allow Dr. Nance to teach the same inmates the theory, the history and the vocabulary of the processes he uses in his practice of psychology.

Chairman Duncan's opinion of Dr. Nance's ability is isolated. It is not supported by the students, the Psychology Division at OCE, the Dean, the president, or the board. Chairman Duncan's opinion was not sustained in the three year judicial process following his original assertion. Duncan's opinion is not supported by the record available for the review of this Court. This review will convince the Court that Chairman Duncan's opinion of Dr. Nance's ability and qualifications to teach general psychology are untrue.

Assuming for the sake of argument that the stipulations of the State are binding and

the burden of proof is upon Chairman Duncan, then it will further the interests of the State to allow him to use his authority in this arbitrary manner? There is a significant possibility that Chairman Duncan's March, 1976 decision was motivated by political reasons. There is also a significant possibility that his May, 1973 decision was motivated for these same political reasons rather than the cause of enrollment decline as he originally stated.

The State's interest are defined by the board in their preface to the Oct, 1973 revision of the Administrative rules at page 22.

> "For if it becomes apparent - or there are grounds for suspicion - that faculty are subject to dismissal for the exercise of academic freedom, whatever the ostensible 'cause' for the dismissal, (a) persons of ability will shun the institution, and (b) faculty members may temper their expression of ideas so as not to expose themselves to the danger of dismissal for having ventured to express an idea that may be found 'dangerous' or displeasing to influential individuals or groups. The impact on the quality of higher education in Oregon would be disastrous . . .

For, according to AAUP, " . . . the vast majority of contested dismissals continue to involve disputes over whether what the individual may have done is part of his academic freedom . . . and many others have arisen under circumstances involving the suspision of ulterior purpose in bringing the charge - a purpose itself believed to violate academic freedom."

> "It is important that there be faculty peer group involvement in proceedings in which academic freedom may be at issue. The issues are usually complex: the practical meaning of academic freedom, ambiguous and conflicting evidence, the determinatin of whether the legitimate "cause" given for the dismissal is genuinely the cause, or is merely a "front" for the real "cause" which may be violative of the academic freedom of the individual involved. The maturity, professional experience, knowledge of the academic world and insight into the nuances of professional ethics and professional conduct possessed by a faculty hearing committee constitute a significant factor in ensuring that the academic freedom of the faculty is fully protected.

The issue is not merely Chairman Duncan's invasion of Dr. Nances' liberty interest, the issue includes the academic freedom of all of the professors within the state system.

A challenge to academic freedom is no less deplorable masked as the necessity of enrollment declines, than it was masked as an attack on communism, or masked as a need to get the U. S. out of Vietnam. The tradition of academic freedom in the United States is completely ignored by the court below in the statement,

> "In the context of labor law, agreements means negotiated agreements.

Petitioner cites no negotiate agreements.

> Instead, he cites a variety of Board rules that permit and encourage faculty consultation and participation in making personnel decisions. By no stretch of the imagination can these rules be viewed as negotiated agreements.'

Therefore, the Petitioner's premise "that the Board has agreements with the Faculty Senate concerning employment rights -- also fails." (p. 8 opinion)

The Board rules referred to in Chief Judge Schwab's opinion are the product of a long tradition of academic freedom. The October, 1973 revision of the rules was made with extensive professional participation. The Board Rules incorporate the concepts of academic tenure derived from the national standards cited in "other authorities" above.

In Judge Antell's decision cited at 2 I above, the tenure rules safeguarding academic freedom compose a negotiated agreement incorporated into every faculty member's contract These rules cannot be capriciously changed without abrogating existing contractual rights. These tenure rules specifically recognize the existance of faculty governance through the Senates, and the participation of faculty in grievance procedures.

Chief Judge Schwab's insistance on "negotiated agreements" as being the only source of binding contractual arrangements threatens to diminish and destroy existing faculty governance in the name of collective bargaining. Chief Judge Schwab's opinion imposes a severe threat to the institution of academic freedom by suggesting the

elimination of all past practices and workable traditions in the rush toward the administrative efficiency of collective bargaining and "negotiated agreements."

The board has said in the preface to the October, 1974 Administrative Rule revision @ page 29.

Unionization - Collective Bargaining - " The instrument most readily at hand is unionization - with collective bargaining. The workings of the unionization and collective bargaining processes with their emphasis upon confrontation would appear to be much less appropriate to the academic world than the collegial relationships that exist under present tenure policies. And the result is likely to be much more rigidity and more exacting requirements insofar as the relationship of faculty to academic administration. The board's office is persuaded that shoring up the administration of present tenure policies in the way the staff proposes later in this present report, will serve the interests of the state much better than will the abandonment of tenure with what the board's office sees as the predictable results cited above."

The board points out on page 36 of their Memorandum of Law Op. Cit., "Faculty senate bodies tend to rely on debate and persuasion on the merits of the issues. Unions tend to rely on power. *** In the faculty senate the emphasis is on cooperation and shared authority rather than on the accomodation of conflicting interests through bargaining backed by power and threat."

This relation between tenure and collective bargaining has invited the attention of the National Commission on Tenure. In their 44th Recommendation they state,

"The commission recommends that collective bargaining in colleges and universities not extend to academic freedom and tenure and related faculty personnel matters, and that grievances involving issues of freedom and tenure be referred to academic procedures outside the collective bargaining process."

The Commission bases their comments on the profound differences they see between academia and the kinds of organizations in which collective bargaining has developed. For instance, student's compose a third interest group in contrast to usual two party agreements in labor relations. The model for decision making is deliberative with shared power, rather than adversary. Adversary relations represent a breakdown in the academic system.

Chief Judge Schwab's opinion that the board rules encouraging faculty consultation and participation in personnel opinions do not constitute negotiated agreements (p.6); that faculty participation in grievance procedures can only be informal (p. 2) and does not constitute binding arbitration (p. 6) and that faculty and student tenure recommendations are not to be accorded serious consideration (p. 4), is not in accord with the interests of the board, the faculty, the students or the citizens of the State of Oregon.

As chief judge of a court of law, Mr. Schwab's responsibility is to examine the relation between the state laws, federal statutes, board rules, the common law, and the rights of the faculty, students, and petitioner pursuant to ORS 28.020 and ORS 183.400 above. The fact that these new rules are designed to bolster the tenure system against the intrusion of collective bargaining was known to Chief Judge Schwab (047-55 ApBr). The fact that there is considerable public in-

terest in the judicial interpretation of these new rules as they apply to faculty and students in their relation with the administration was known to Chief Judge Schwab. (see fact 3 I above) All of the laws cited in this petition are questioned in earlier briefs. Chief Judge Schwab limited his comments to ORS 351.070 (1a), ORS 243.666 (3), ORS 243.706 (2) and ORS 183. 480 (7) (a). He does not answer any questions concerning construction, applicability or validity of any of these laws and rules.

Mr. Justice Douglas's quote at 2C above applies to this case; the difference between rule by law and rule by whim or caprice is procedural in nature. Constitutional rights cannot be assessed independent of the state laws adopted pursuant to these rights. Chief Judge Schwab cannot pass judgment on the petitioner's rights without examining the applicability of these state rules. "Equal justice under the law" requires the examination of whether the petitioner is entitled to the treatment by the same terms as provided to other citizens with the same statutory privileges and immunities.

OAR 41.355 establishes that Dr. Nance is entitled to the same academic freedom as other professors within the state system. This freedom extends to <u>freedom</u> of labor and <u>freedom</u> of association and it is based upon <u>liberty</u> of contract (ORS 662.020). This freedom is basic to the well being of a democracy. In the quote by Mr. Justice Marchall at 2d above, reasonableness is equated with due process and procedural safeguards against the process of having the same state official make a decision and appraise it's reasonableness.

Corpus Juris Secundum defines equity as being synonymous with reasonableness (at 30). Webster's Collegiate Dictionary defines liability as being

an obligation according to the laws of equity. When 42 USC 1983 describes the liability of a person enforcing a rule which abrogates a constitutional right, then the statute describes the necessity of examining the issue of equity. Likewise, ORS 11.020 requires a proceeding in equity if there is not a plain, adequate, and complete remedy at law. In fact, Chief Judge Schwab's test of the reasonable man is a test of equity. In a labor dispute, the balancing of ORS 662.080 (3) is a test of equity.

This case involves a licensing challenge as in Schware (2F above), a dispute over contract rights; a labor dispute and a challenge to academic freedom. The proper judicial remedy requires a proceeding in equity. To allow liberty and freedom to be arbitrarily and capriciously cancelled for political reasons, without an equitable review is not in the best interest of the state.

i. CONCLUSION

As there are but 40 days remaining to the 200th birthday of the declaration of independence of this country, I pray the Supreme Court will allow me to conclude with a remark on the relation of "the spirit of '76" to this case. There is much public attention to the "spirit of '76" generated by a reflective reminiscence on how much of this spirit flourishes in America today.

Our founding fathers prolonged their declaration with a daring statement on the precepts of the new republic.

"We hold these truths to be self-evident:- That all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safely and happiness."

The declaration makes clear to the other soveriegn nations that we were only taking this step after suffering the countless injustices which occur when citizens are subjected to the arbitrary and capricious action of a totalitarian government. For instance,

"He has combined with others to subject us to a jurisdiction foriegn to our constitutions and unacknowledged by our laws giving his assent to their acts of pretended legislation . . . for

depriving us in many cases of the benefit of trial by jury."

The "Spirit of '76" is enacted into law in the Constitution. The language of the prologue to the Declaration of Independence is repeated in the Bill of Rights. This spirit unifies the theme of the Bill. The first amendment right to a citizen's protection from abridgment of freedom of speech or right to petition the government for a redress of grievanced, is connected to the fifth amendment's right to protection from the deprivation of life, liberty, or property without due process of law. Freedom may only flourish under the protection of the law.

It is the seventh amendment which enforces this spirit in matters of civil rights. The rights to liberty, equality, and property are protected by a trial before a jury of peers, and the guarantee that their findings of facts shall not be re-examined by higher courts except according to the rules of the common law. This procedure protects a citizen from the arbitrary and capricious action of the government by making the government base its legal interpretations on the findings of a panel of citizens. Protection of the jury system is a major correction to the injustice of the totalitarian government.

The "Spirit of '76" was challenged by the institution of slavery; the challenge led to our Civil War. The result was the 14th Amendment extension of the protection of the Bill of Rights to the relation between states and citizens, guaranteeing each citizen the equal protection of the laws. The Civil Rights legislation fixes the liability for depriving a citizen of rights, privileges or immunities secured by the Constitution and laws upon the person making the decision, and defines a proper proceeding for redress as a

suit in equity. (42 USC 1983)

The "Spirit of '76" is of special importance to the public universities of this country, for they are one of the grand institutions safeguarding democracy by checking the growth of totalitarianism. The "pall of orthodoxy" must not be pulled over the universities because this would end academic freedom. Academic freedom is of paramount importance in maintaining the basic freedoms which are the precepts of this nation.

The state's grant of academic freedom is conditioned upon the assumption of academic excellence. The ivory towers are not intended to be the refuge of the mediocre. The traditional system of tenure assures the citizens that those who have the protection of speech and enquiry are reasonable and capable people. Tenure assures the existance of rigorous and objective standards for measuring performance for from three to six years before full academic secruity is awarded.

The "Spirit of '76" as it is expressed in the academic freedom of the first amendment is protected by a "right of petition for a redress of grievance" which includes faculty at the fact finding stages of investigation and hearing. The courts have long recognized the value of a "jury of peers" in academia to measure the subtle nuances of threats to academic freedom versus the demands of maintaining academic excellence. This tradition is not in complete accord with the concept of the outside arbitrator in labor-management disputes; the difference is in the degree of community of interests between administration, faculty, and students in the university. To control against a loss of objectivity on the part of a faculty jury, the final decision in academia is to be made by the Board of Higher

Education. This body of lay citizens is the ultimate test of the interests of the state in academic freedom and academic excellence.

This system of gaining academic excellence through a rigorous system of tenure; and protecting academic freedom through faculty based panels for resolution of grievances has worked very well during the past 200 years. In our recent history we have seen this system withstand the witch-hunting of the McCarthy era, and the obstructionism of the anti-Vietnam era. We now face the challenge of another threat, an era of declining enrollments after a period of overly rapid expansionism.

This case is but the beginning of a number of such challenges to the "spirit of '76" in academic freedom. The boards, the administrators, and the citizens are justly resisting the natural tendency for a faculty to become "tenured" in "as the large number of professors hired for the WWII baby boom, advance to permanent tenure. The prosperity and stability of our society does require that the system provide room for the best scholars, teachers, and researchers of each generation to enter into the academic profession. It is also just that faculties become more representative of our population by increasing the number of women, black people, Chicanos, Indians and other ethnic and racial subgroups.

In previous periods of stability the faculties of the nation have dealt with the need to balance freedom and excellence by the quota system. This is the familiar pyramid of many instructors, fewer Assistant Professors, and only a few full Professors at the top of the cone. There is competition at each level for advancement into the next higher level. The positions at each higher level are fixed by

retirements or advancements. An aspect of this historic system has been an up or out philosophy still reflected in the "publish or perish dictum." This historic system combines the best of the "yankee entrepeneur", the fiery competition of the free market. Faculties may moan and groan, but they have accepted it in the past, they will accept it in the future. This system of dealing with contraction does not threaten academic freedom, and it promotes academic excellence.

This case points out the problems involved in the alternative means of preventing a faculty from becoming "tenured in", by removing faculty positions from the tenured track and replacing them with term appointments. A term appointed faculty member is a "king's man", totally beholden to the administration for continued employment. A term appointed faculty member cannot afford the luxury of loyalty to academic freedom. The dictates of his conscience in his enquiry into truth or his presentation of truth to his students is severely hampered by the needs of securing his next term appointment. The relation between term appointed faculty and administration is akin to the traditional labor-management relations. This relation reflects the erosion of the spirit of academic community with the shared exercise of authority.

Caught in the cross fire of administrative demands for flexibility and faculty demands for security, the "spirit of '76" is threatened in academia. An increasing number of faculties across the nation are moving into rigid collective bargaining arrangements to protect the threats to job security imposed by the move toward term appointments. This rigidity defeats the flexibility the society is attempting to achieve by preventing "tenuring in", Collective bargaining agreements tend to impose contracts with more stringent grievance procedures by outside arbit-

rators, available after shorter periods of probation. The pyramid of academic ranks is replaced with the socialism of the collective voting unit. Academic excellence suffers, and freedom is often not balanced with proven reason.

This overly rapid erosion of tradition in academia borders on revolution. The revolution of '76 established a government of the people, ruled by law. This academic revolution, could end that tradition by creating rule by whim and caprice on the part of either the administration or the faculty. As Thomas Jefferson has said, "the price of our democracy is eternal vigilance." This vigilance is maintained in large part by this august Supreme Court. Academia needs your guidance in the evolvement of the tradition of freedom through this difficult era of retrenchment.

The paradoxical, inconsistant and confused action of the state throughout the three year history of this case will indicate to the Court the severity of the underlying malady. The state allowed the faculty do challenge the good faith of an enrollment decline decision through the traditional channels of ajudicating issues of "academic freedom". The burden of proof was upon the administration and they failed to establish their good faith. This failure embarrassed the state and they made some post-hoc interpretations to attempt to strip tenure rights and alter the delegation of authority to the faculty jurors.

The state can be forgiven for providing a court proceeding in which the petitioner was never given the opportunity to appear before the court, where his motions were ignored, and where the decision occured 16 months after the entry of the case on the docket of the court.

The state can be forgiven for passing motions of the defendants one day after they were made without allowing the petitioner to respond, and for allowing the attorney for the respondents to consult in person with the court without the presence of the petitioner. The state may not be forgiven for acting in a manner inconsistent with the best interest of the citizens.

It is not in the best interest of the citizens that the same officer can prepare charges, defend his charges, fail to comply with subpoenas, fail to establish his good faith, and finally enter the final order of the state on his own contested decision, and have that arbitrary action sustained without higher review. It is not in the best interest of the citizens that an agency may say the chancellor has made the final order, prepare your defense accordingly; and then for the court to ignore this stipulation and say the president's order was final. These actions contradict the basic precepts of a rule by law, and deny the basic concepts of equity.

The revolution of 1776 had the task of establishing a rule by law in the face of a totalitarian system which allowed arbitrary and capricious state action against citizens. For 200 years, this rule by law has been protected by the eternal vigilance of the Supreme Court. The balance of proof has shifted. Now those agents of the state who wish to take arbitrary and capricious action against a citizen must assume liability for proving their action is lawful. The "Spirit of '76" and the spirit of academic freedom still flourish in this country.

The petitioner is entitled to have the case considered by the Oregon State Supreme Court pursuant to ORS 662.120. The instructions should include an order to vacate those portions of the Court of Appeals decision referring the labor

dispute portions of the case and refer them to PERB pursuant to ORS 662.100, ORS 243.766 (3 & 4), and ORS 240.086 (2). Also, those portions of the decision referring to the substance tenure contract portions should be vacated and referred to the State Board of Higher Education, pursuant to ORS 183.460, ORS 183.470, ORS 351.060, OAR 41.375, OAR 41.475 and Adm Code 66 & 62. The petitioner is entitled to the privilege of his tenured contract, and his academic freedom during the proceedings pursuant to ORS 183.450 (5), ORS 243.756, OAR 41.355, OAR 41.360 and the 14th amendment to the Constitution of the United States.

I pray the Supreme Court of the United States will accept this petition for Certiorari.

Respectfully submitted,

John B. Nance

John B. Nance, Ph. D.

May 24, 1976

ATTACHMENT A1

Report of Findings and Recommendations - Faculty Welfare Committee - April 30, 1974

A. Allegations: In filing a grievance with the faculty welfare committee, Dr. John Nance has asserted that he has been terminated for cause despite administrative claims of "declining and shifting enrollments." He feels that he has been deprived of "due process" in that administrative statements concerning his competence to teach psychology have diminished his professional reputation.

B. Committee Objectives: It is not the function of the faculty welfare committee to pass final judgment on these complex legal questions. The committee has the responsibility to determine if sufficient evidence exists to entitle John Nance to the hearing which has been denied him thus far.

C. Procedure followed: We have interviewed Dr. John Nance, Dr. Donald Duncan, Dr. Frank Sattershite, and Dr. Bert Kersh. In addition to these interviews, we have reviewed transcripts, copies of letters, peer evaluations, and other materials submitted to the committee by Dr. Nance.

D. Findings of Fact: 1. There seems to be little question that Dr. Nance has proven competent in teaching psychology. 2. However, on May 22, 1973, Dr. Duncan wrote that "Due to enrollment reductions, Dr. Nance will not be retained on the staff after the 1973-74 academic year." 3. On May 23, 1973, Dr. Kersh wrote to President Rice, "We propose to replace John Nance with a person who is first and foremost a psychologist, ideally one who is prepared to teach a broad range of courses in that area." 4. Those letters, written one day apart, seem to contradict one another. Clearly, when a faculty member is not

reappointed, the hiring of, or intent to hire a replacement would appear to be prima-facie evidence that enrollment decline is not the reason for termination." 5. Since these letters were written, the question of replacing Dr. Nance has become unclear. In a talk with Dean Kersh on April 26, 1974, the committee learned that Dr. Nance may be replaced in part by term appointments.

E. Conclusion: There is reasonable grounds to assume that the decision is based on the belief of the administration that Dr. Nance is not first and foremost a psychologist.

F. Proposed Order: 1. Should an opening appear in the psychology division for the next school year, John Nance should be retained unless it can be clearly demonstrated that he does not have the necessary training and experience to fill the position. 2. In filling either part or full-time positions in the psychology division next year, John Nance should have precedence over all people on term appointments unless it can be clearly demonstrated that he does not have the necessary training and experience to fill the position. 3. A hearing should be granted to John Nance to allow him to pursue his claim that the procedures followed in his dismissal have veen in violation of administrative rules and constitutional law.

Respectfully submitted,
Jay Evett, Richard Meyer, Joel Newman

ATTACHMENT A 2
Minutes of the Oregon College of Education
Faculty Senate - Meeting No. 19, May 14, 1974

"Richard Meyer and Joel Newman presented the report of the Welfare Committee on its investigation of John Nance's grievance regarding termination of his teaching contract. The sub-committee found what appeared to be contradictory statements made by members of the administration, and it was their befief that reasonable doubt existed as to the reasons for non-renewal of the contract and the appropriateness of the actions taken. (See proposed order above in A 1 for their recommendations.)

"It was moved by Sumner, seconded, that the faculty accept the Sub-committee's report, thereby endorsing its three recommendations."

"Brownlow said that she found the third recommendation to be appropriate, but the first and second recommendations not to be appropriate. Millsap and Mason expressed similar opinions. Meyer and Newman explained their intentions and defended all three recommendations. . . The motion passed on a roll-call vote as follows: Yes, Bergman, Coolbaugh, Drexler, Utz, Meyer, R. Davis, Stobie, Sumner, Weiss; No, Brownlow, Ferguson, Knuth, Millsap; Abstain, Mason, Ruckman.

"Discussion next centered around the third reccomendation. Who should conduct the hearing? What would be the function of the hearing? Under what rules would it be conducted?"

"It was moved by Bergman, seconded, that the Welfare Committee be authorized to conduct a hearing in accordance with the Administrative Rules in the case of John Nance. The motion was passed on a roll-call vote; 15 for, 1 abstain."

ATTACHMENT A3
SUBPOENA

State of Oregon Date: 6/6/73

To:
From: Faculty Welfare Subcommittee
Subject: Hearing on John Nance

The Faculty Senate has authorized the Faculty Welfare Committee to reopen this investigation of the John Nance grievance. This investigation is being conducted today (6-6-74) in Ed 209-E from 9-12 and 1-4. A subcommittee of three members of the Faculty Welfare Committee and John Nance will be present and may ask questions. A request will be made to tape your testimony if you are willing. On completion of the hearing the subcommittee will prepare a report which will be passed by the Faculty Welfare Committee to the Faculty Senate. Your testimony is requested. Please contact Bev Herzog at Ext. 322 for a time or go to Ed. 209-E.

ATTACHMENT A4
HEARING REPORT
7-12-74
Finding
7-12-74

OREGON COLLEGE OF EDUCATION
MONMOUTH, OREGON 97361

Findings of Fact:
1. "No evidence was collected that the committee saw as significantly altering their earlier understanding of the case based on the original investigation."
2. "Testimony of several key witnesses was not heard." (President Rice, Chairman Duncan, Division Head Warnath, Media Director Smith)

Conclusion:
"The committee therefore can only resubmit the original first two recommendations presented by the Faculty Welfare Committee to the Faculty Senate, and passed by the same on May 14, 1974."

Proposed Order: (See proposed order 1 & 2 in A 1)

ATTACHMENT A5
MINUTES OF THE OREGON COLLEGE OF EDUCATION FACULTY SENATE

Meeting # 2 July 16, 1974

Anderson moved, seconded by Utz, that the Senate reaffirm its support of the Welfare Committee recommendation as contained in the submitted report of July 12, 1974.

The motion passed on a roll-call vote as follows:
Yes, Anderson, R. Davis, Ellington, Ferguson, Jaffer, Hoskisson, Meyer, Pennock, Punke, Utz.
Abstain, Glogau, Sumner.

ATTACHMENT B

OREGON COLLEGE OF EDUCATION

MONMOUTH, OREGON 97361

March 21, 1975

To: Dr. Leonard Rice, President
Oregon College of Education

Mr. Donald J. Weiss, President
OCE Faculty Senate

Dr. John B. Nance, Petitioner

From: Nance Hearing Committee

Introduction: This hearing committee was formed at the request of President Leonard W. Rice. The members were selected from members appointed to the Faculty Welfare Committee by the President of OCE. The hearing committee members were selected so as to be from different departments and to include both tenured and nontenured faculty.

The purpose of this hearing was to seek and consider the facts relating to the procedures that were followed leading to termination from employment at Oregon College of Education of John B. Nance.

The hearing was carried out according to accepted practices with a court reporter, peremptory challenge of committee members, and cross-examination of witnesses. Formal hearing sessions were held on January 16, 24 and 30, 1975, for a total of about twenty-one hours. Included in these sessions was the testimony of thirteen witnesses The transcript of the hearing consists of 560 pages.

Summary and Findings of Hearing: 1. Dr. Nance holds a A.B. degree in Communications, M. S. in Ed. and Ph.D. degrees in Instructional Technolog and his transcripts show that he has a strong

background in psychology.

2. The process of hiring Dr. Nance, structure of his teaching load at OCE involving 3/4 of his FTE in psychology and 1/4 in media, his published work and research, and evaluations by his colleagues, division and the department chairman all reflect that Dr. Nance must have had a general background in psychology wich a specialty in media.

3. There is generally a positive review and evaluation of Dr. Nance's work by his colleagues, the chairman, and students at OCE.

4. Disagreements involving Dr. Nance exist in the media section where he taught one-fourth of his FTE. Although the committee heard testimony on this point, no evaluation is made regarding this point as no cause was cited against Dr. Nance by the administration.

5. The administration proposed to reduce the number of faculty positions due to declining and shifting enrollments. Cuts were to be made in areas that would not hinder established degree programs. Media was one area to be cut.

6. The letter of June 7, 1973 (exhibit 2) from the President of OCE to Dr. Nance appears to be ambiguous lending two possible interpretations: notice of termination and statement of uncertainty. The committee notes that two letters given by the President during Spring, 1973 were clear letters of termination, and the other three letters including the one to Dr. Nance reflect uncertainty of future employment at OCE due to declining enrollment.

7. The June 7 letter to Dr. Nance from President Rice does not cite any specific "cause" other than the general conditions of "declining and shifting

enrollments" at the college.

8. According to AR 41.010, para 5, the notice of appointment shall include:

a. Effective date of appointment.
b. Description of position offered.
c. Academic rank and title.
d. Duration of appointment.
e. Tenure statue, including restrictions on eligibility for tenure.
f. Compensation offered.
g. Other conditions of employment (41.120 initial appointment and probationary service, AR 41.310, para 2 timely notice).

The notice of appointment issued to Dr. Nance during Fall, 1973 does not include any mention of uncertain employment conditions at OCE or a reference to the June 7 letter. The same is true of the contents of the "Pink Slip" issued to Dr. Nance during Summer, 1973.

9. Although the college was supposedly operating under the "old" (prior to July, 1973) Administrative Rules to evaluate the OCE faculty in Winter, 1973, the college administration had begun to experiment with the new Administrative Rules at that time.

AR 41.320, para 1 (Subpara 5) states that "the released faculty member's place will not be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment and a reasonable time within which to accept or decline it." This applies to tenured and nontenured staff.

10. There has been net addition of more than one staff in the psychology division (which employed Dr. Nance for three-fourths of his FTE) after Dr. Nance received the June 7 letter without offering a position to Dr. Nance.

11. The committee explicitly recognizes that the college administration has the right to issue a notice of termination as provided in AR 41.310 to a faculty member on probationary appointment without citing and/or implying any cause for such notice. This right was clearly exercised as noted under item 6 above.

Proposed Order

I. Given the facts that (a) Dr. Nance was not given a clear and unambiguous letter of termination; b) "shifting and declining enrollment" were cited as general conditions at the college, and no "cause" was cited against Dr. Nance; (c) a net addition of teaching positions has been made in the psychology division where Dr. Nance has taught three-fourths of his teaching load annually; and (d) Dr. Nance duly appealed the case within the time limits; it is the recommendation of the hearing committee that Dr. Nance be given all the privileges and benefits due him as a faculty member during 1974-75 and that the administration issue him an appropriate appointment for 1975-76.

II. The committee further recommends that (1) The administration use extra precaution in issuing appointments and timely notices and make sure that they conform to the governing rules and statutes; and (2) the cases involving differing recommendations from the division chairman or section coordinator and the department chairman regarding tenure, promotion, unusual salary adjustment, and the notice of change in employment status should be referred to the Senate committee on personnel matters for fact-finding and verification before they are submitted to the Dean and the President.

(cc: Mr. Edward Branchfield, Asst. Att. Gen. & Counsel, Dept. of Justice, State of Ore., Counsel for the Nance Hearing Committee, Dr. Bert Kersh, Dean of Faculty, Rep. of the OCE Administration.

ATTACHMENT C

No. 477—December 15, 1975

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NANCE, *Petitioner, v.* OREGON STATE SYSTEM OF HIGHER EDUCATION ET AL (CA 3637), *Respondents.*

Judicial review from Oregon State System of Higher Education.

Submitted on record and briefs October 29, 1975.

John B. Nance, Monmouth, filed the briefs pro se.

Lee Johnson, Attorney General, W. Michael Gillette, Solicitor General, and Catherine Allan, Assistant Attorney General, Salem, filed the brief for respondents.

Before SCHWAB, Chief Judge, and LANGTRY and FOLEY, Judges.

AFFIRMED.

SCHWAB, C. J.

Petitioner appeals from a decision of the State Board of Higher Education, made by its subordinates, affirming the nonrenewal of his annual appointment to the faculty at the Oregon College of Education.

Petitioner elected to represent himself in the administrative hearing that generated a 558-page transcript. Petitioner elected to represent himself on this appeal, filing an 89-page brief and a 47-page reply brief. This is petitioner's unquestioned right. But the exercise of such right imposes certain responsibilities, such as, (1) compliance with procedural rules designed to insure fairness to all litigants, and (2) clear communication of his contentions.

As for procedural compliance, petitioner acknowledged during the administration hearing that he understood that to be his only opportunity to introduce evidence on his factual contentions. Nevertheless, on appeal petitioner has deviated from the hearing record by citing newspaper articles, minutes of State Board meetings, proceedings at the University of Oregon, proceedings before the Public Employe Re-

lations Board, collective bargaining agreements between the Board and the faculties at other campuses and the "PPP Report," whatever that is.①

As for communication, petitioner's argument starts: "This is a proceeding in academic due process." His argument continues with numerous references to: "the issue of academic freedom"; "the end of the tenure system"; "the health of the [teaching] profession"; "medieval university structures"; and the "balance of power" between the administration and faculty. We doubt that these issues are generally justiciable. To the extent that they might be, we are not confident that we have been able to deduce petitioner's exact contentions.

As we understand the record, petitioner received a series of three, one-year appointments to the OCE faculty. These were "yearly tenure" appointments; they provided that petitioner could not be discharged during the year except for cause, but did not guarantee that petitioner's employment would necessarily be renewed for following years. *See generally, Papadopoulos v. Bd. of Higher Ed.,* 14 Or App 130, 511 P2d 854, Sup Ct *review denied* (1973), *cert denied* 417 US 919 (1974).

After three years' employment, petitioner was entitled to one year's notification that his employment would not be renewed. At the end of petitioner's third year, college officials notified him that his fourth year would be his last.

Petitioner strenuously objected to that determination. A series of informal efforts to mediate the dispute between petitioner and the college, similar to the informal procedures described in *Papadopoulos,* 14 Or App at 139-151, proved inconclusive. The Board, through counsel, then agreed to afford petitioner a formal contested case hearing pursuant to the Administrative Procedures Act, ORS ch 183.

① Petitioner's opening brief makes "assignments of error in law" and separate "assignments of error in equity." It is not clear what he perceives to be the distinction between law and equity. This is not an equitable proceeding.

The formal hearing was conducted before a subcommittee of the Faculty Welfare Committee of the OCE Faculty Senate. The committee's recommendations were generally favorable to petitioner. On review the college president's findings and conclusions were all adverse to petitioner, the ultimate conclusion being that "[t]he termination of Dr. John B. Nance as a faculty member of Oregon College of Education • • • is hereby affirmed • • •." It is from this determination that petitioner appeals.

Petitioner belabors the claim that he had a protected property interest and a protected liberty interest within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioner seems to recognize the general rule to be that a public employe with "yearly tenure" has no legitimate expectation of continued employment beyond that year. *Papadopoulos v. Bd. of Higher Ed.*, supra. But in an apparent effort to invoke an exception to the general rule, petitioner variously argues he had a property right: "to an evaluation"; to "an explanation" of the reasons his contract was not renewed; to "the use of the APA"; based upon established tenure "criteria and procedures"; and based upon the generally favorable "Findings and Recommendations of the • • • Hearing Committee."

It is not clear that petitioner understands the body of law he invokes. The Due Process Clause does not prohibit the government from depriving citizens of liberty or property. That happens every day in cases ranging from criminal to condemnation. All the Due Process Clause requires is that, in circumstances such as these, government action be preceded by allowing the affected citizen an opportunity to be heard. Petitioner does not contend that he had other than a full and fair opportunity to be heard during the contested case hearing. Therefore, the possible existence and extent of his alleged property interests are now irrelevant.[6]

[6] We do not here hold that petitioner was entitled to a contested case hearing on the reasons for the nonrenewal of his annual appointment. That decision was made by the State Board, through counsel, not by us.

Even though irrelevant, one of petitioner's "property interest" arguments so completely misses the mark that it merits additional comment. Petitioner claims he had "an affirmative tenure evaluation" from the other faculty members in his division. He then cites one of the Board's rules: "indefinite tenure shall be awarded to faculty of demonstrated professional competence by the institutional executive • • •." Based on the "affirmative tenure evaluation" and the regulation, petitioner concludes he had a "right" to tenure.

We are not sure what part of the record is supposed to constitute the "affirmative tenure evaluation." There are some evaluations of petitioner by his faculty colleagues. They were written in response to the following memorandum:

> "As most of you know, the possibility of [petitioner] receiving a year's notice of termination has been discussed within the division informally as well as at the last divisional meeting. The consensus seems to be that our role should be limited to providing an evaluation of [petitioner's] contribution to our program • • • for consideration by the department chairman • • •."

In response to this memorandum, petitioner's colleagues generally recommended his retention. They did not express opinions on a question they were not asked—whether petitioner should be granted tenure.

But assuming for the sake of discussion that petitioner received a favorable tenure recommendation from his immediate peers on the faculty, this does not create any "right" to tenure. Under the statutory scheme, ORS 351.070(1)(a), personnel decisions are made by the State Board and its subordinate officials —in other words, the administration. Petitioner misreads the Board's rule when he concludes that tenure must be granted to faculty members who demonstrate professional competence to their colleagues or students. Instead, it contemplates demonstrating professional competence to those who make the ultimate decision—the administrators.

Petitioner next contends the conclusions of the formal hearing committee constituted a final decision that was not subject to modification by the college president. His reasoning in support of this contention is unclear.

If petitioner means that as a matter of general administrative law, the record-making body is always the same as the decision-making body, he is incorrect. It is a familiar administrative practice to separate record-making functions, such as before a hearing officer, and the subsequent final decision by the agency. We find nothing in the State Board's rule contrary to this customary practice.

If petitioner means that in his individual case there was a delegation of authority to make a final determination to the hearing committee, he is also incorrect. We find nothing in the record or regulations to support a finding of such delegation of authority. The discussion above rejecting the claim of delegation of final authority to petitioner's faculty colleagues is equally applicable to the claim of delegation of final authority to the faculty hearing committee. Moreover, we note that during the course of the hearing nobody seemed to think the committee was making the final decision; at one point, petitioner referred to the committee's forthcoming "recommendation"; and in fact, the committee phrased its conclusion as a "recommendation."

Petitioner's final effort to establish that the committee's decision was final invokes the public employes' collective bargaining law, ORS ch 243. Petitioner argues:

> "The State Board • • • recognizes the OCE Faculty Senate as a collective bargaining agent pursuant to ORS 243.666(3). The Board has an agreement with the OCE Faculty Senate concerning employment rights, contracts and grievance procedures."

Building on this foundation, petitioner's argument continues that the hearing afforded him was actually

binding arbitration in accordance with ORS 243.706 (2), and concludes that the State Board is committing an unfair labor practice by not honoring the "arbitration" decision.[3]

The short answer is that petitioner's premises, quoted above, are based on factual matters that are not even remotely contained in the administrative record before us. There is not the slightest suggestion whether the Board has or has not recognized the Faculty Senate as a collective bargaining agent. Indeed, going beyond the record petitioner tells us that the "OCE faculty has attempted to gain PERB certification since February, 1973," which has been opposed by the Board. The claim that the Board opposes certification, if true, certainly seems inconsistent with petitioner's major premise that the Board has already recognized the Faculty Senate as a collective bargaining agent.

Petitioner's other premise—that the Board has agreements with the Faculty Senate concerning employment rights—also fails. In the context of labor law, agreements means negotiated agreements. Petitioner cites no negotiated agreements. Instead, he cites a variety of Board rules that permit and encourage faculty consultation and participation in making personnel decisions. By no stretch of the imagination can these rules be viewed as negotiated agreements. Moreover, nothing in the rules petitioner cites could conceivably amount to a binding arbitration procedure.

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[3] The labor relations statutes upon which petitioner relies provide:

> "Nothing in this section prevents a public employer from recognizing a labor organization which represents at least a majority of employes as the exclusive representative of the employes of a public employer when the board has not designated the appropriate bargaining unit or when the board has not certified an exclusive representative in accordance with ORS 243.686." ORS 243.666(3).
>
> "In addition to subsection (1) of this section, a public employer may enter into a written agreement with the exclusive representative of its employes providing that a labor dispute over conditions and terms of a contract may be resolved through binding arbitration." ORS 243.706(2).

As yet another, and seemingly alternative, argument, petitioner suggests that even if the hearing committee's determination was subject to review, such review had to be by other than the college president because of his prior contacts with the nonrenewal issue. But prior contacts do not per se establish lack of impartiality. *Withrow v. Larkin*, — US ——, 95 S Ct 1456, 43 L Ed 2d 712 (1975). And there is no other comprehensible claim the president lacked the requisite impartiality.

Two factual questions were litigated before the hearing committee: (1) the adequacy of the notice petitioner received; and (2) the reasons behind the administrative decision that his annual appointment would not be renewed.

There is no claim that notification of nonrenewal was not timely. The issue is its adequacy. The notification reads:

> "The purpose of this letter is to inform you that OCE cannot presently assure you of employment beyond the 1973-74 academic year. It is necessary that this notice be sent to you before June 15, 1973, because of State System administrative rules. These rules require that a non-tenured faculty member be given a full years notice if he cannot be employed beyond that period.
>
> "I believe that Don Duncan and Bert Kersh have explained to you that declining and shifting enrollments have necessitated this decision. You are regarded here as a creative individual, especially in the art of film making. Several students have gone out of their way to inform me of their appreciation for you as a person and a lecturer. I regret that the budget limitations thrust upon us by sharply declining enrollment force a decision like this one upon us."

The hearing committee concluded that petitioner "was not given a clear and unambiguous letter of termination." On review, the college president concluded:

> "There was no ambiguity in the notice given to

> Dr. Nance. He was informed orally of the decision prior to receiving a letter from the president on June 7, 1973. In numerous subsequent conversations with the dean of faculty and with the president he expressed no confusion about intent of the notice he had received but rather concentrated upon getting the decision reversed."

There is ample evidence to support the president's decision. At one point a member of the hearing committee asked petitioner, "What did you understand this letter to mean?" Petitioner replied, "It definitely meant that I was receiving a year's notice and that the basis of the notice was enrollment declines." At another point the college president testified that faculty members always receive advance oral notification so that a letter "never catches anybody cold." Petitioner agreed the letter did not "catch him cold":

> "Yes, because I had in fact a meeting with Don Duncan on May the 22nd in which he handed me this and asked me to sign it. It notified me right down here I was not going to be retained on the staff. That one surprised me, but your letter didn't since I had some forewarning."

Under these circumstances, the notice was sufficient to communicate to a reasonable person in petitioner's position that his employment would not be renewed.[6] *See, Perrin v. Ore. St. Bd. Higher Ed.*, 15 Or App 268, 274, 515 P2d 409 (1973), Sup Ct *review denied, cert denied* 417 US 950 (1974).

There is some confusion in the record about the reasons behind petitioner's nonrenewal. Much of the evidence suggests the reason was college-wide declining enrollment that necessitated a reduction in staff. Yet other evidence indicates that, although the administration was generally satisfied with petitioner's

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[6] Petitioner claims that the college president's determination was based on evidence outside of the hearing record. This contention appears to be technically correct, in that the president's decision recited certain background facts that never came out during the hearing. But petitioner does not indicate any way in which this technical error might have been prejudicial; hence, it is no basis for reversal. ORS 183.480(7)(a).

performance, they thought they could replace him with somebody even better; this seems inconsistent with a staff-reduction rationale. Another inconsistency arises from evidence that other teachers were being hired just before the decision not to renew petitioner's employment; if declining enrollment necessitated a staff reduction, it seems reasonable to expect that new teachers would not have been hired in those areas slated for reduction.

There was conflicting evidence about petitioner's specialization. He was teaching both media and psychology courses. The administration perceived petitioner as primarily a media professor, and determined media was one area where staff should be reduced. Petitioner presented evidence that he was primarily a psychology professor, an area where there was apparently no reduction in staff.

But the fact remains that at the end of each yearly appointment, assuming proper notice, the school administration could choose not to renew petitioner's employment for any reason or no reason, other than a few constitutionally impermissible reasons, such as race, not claimed to be involved here. *Schlichting v. Bergstrom*, 13 Or App 562, 511 P2d 846 (1973). Even if petitioner unequivocally established all that he claims, i.e., that he was primarily a psychology professor and the administration's contrary perception was a serious error or that staff reduction was not the real reason for his nonrenewal, this would be no basis for setting aside the administration's determination.

Petitioner will probably fault us for not considering numerous other issues he will claim he has raised. There might, indeed, be other issues lurking in this case, since, for example, petitioner's briefs are peppered with citations to various provisions of the federal and state constitutions. But what we have said above disposes of all issues that we both understand and believe warrant published comment.

Affirmed.